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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1034~~ ~~687~~ 392

THE STATE OF NORTH CAROLINA AND WILLIAM P. ROBERTS, AUDITOR OF THE STATE OF NORTH CAROLINA, APPELLANTS,

vs.

ALFRED H. TEMPLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED SEPTEMBER 6, 1887.

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INDEX.

	Original.	Print.
Caption	1	1
Prosecution bond	1	1
Bill of complaint	2	1
Subpœna	20	10
Return of subpœna	21	11
Appearance of parties	22	11
Motion to dismiss as to the State	22	11
Demurrer of Wm. P. Roberts, auditor, &c.	23	12
Argument of cause	25	13
Decision reserved	25	13
Division of opinion announced	26	13
Decree	26	14
Appeal	27	14
Citation and bond waived	27	14
Certificate of division	28	15
Certificate of clerk	31	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 27, 1888.

1 UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Circuit Court, Fourth Circuit.

Be it remembered that on the 12th day of April, 1886, Alfred H. Temple, a citizen of the State of North Carolina, by his solicitors, Edward L. Andrews, Samuel F. Phillips, and Gray & Stamps, filed his bill in the office of the circuit court of the United States for the eastern district of North Carolina against the State of North Carolina and William P. Roberts, the auditor of the State of North Carolina, and gave bond for the prosecution of his said suit in the words and figures following to wit:

Prosecution Bond.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Circuit Court, Fourth Circuit.

A. H. TEMPLE
against
STATE OF NORTH CAROLINA and W. P. ROBERTS, Auditor of State of North Carolina.

Know all men by these presents that we, A. H. Temple, as principal, and W. S. Primrose, as surety, are held and firmly bound unto the defendants in the above-entitled action in the sum of three hundred dollars, to the payment of which we bind ourselves firmly by these presents.

Sealed with our seals and dated this 12 day of April, 1886.

2 The condition of the above obligation is such that whereas the plaintiff in the above-named cause has brought an action against the said defendants therein: Now, if the said plaintiff shall prosecute his said action with effect, or in case he fail therein shall well and truly pay all such costs and damages as shall be awarded and recovered against the said plaintiff in said action, then the above obligation is to be void; otherwise it is to remain in full force and effect.

A. H. TEMPLE. [SEAL.]
W. S. PRIMROSE. [SEAL.]

Taken and acknowledged before me this 12th day of April, 1886.
N. J. RIDDICK, *Clerk.*

Which said bill of complaint is in the words and figures following, to wit:

Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the eastern district of North Carolina:

Your orator, Alfred H. Temple, who is a citizen of the State of

North Carolina and a resident of the city of Raleigh, in said State, brings this his bill of complaint against the State of North Carolina and against William P. Roberts, the auditor of the State of North Carolina, and who is a citizen of said State.

3 And your orator brings this bill as well on behalf of the holders of special tax bonds of the State of North Carolina issued to the Wilmington, Charlotte and Rutherford Railroad Company who may hereafter come in and contribute to the expenses of this suit as upon your orator's own behalf.

And thereupon your orator complains and shows—

That in and by the constitution of the State of North Carolina, adopted upon the 23rd day of April, 1868, it is provided as follows:

"Until the bonds of the State shall be at par the General Assembly shall have no power to contract any new debt of pecuniary obligation in behalf of the State, except to supply a casual deficit or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually; and the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State and be approved by a majority of those who shall vote thereon. (Article 5, section 5.)

"Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose." (Article 5, section 8.)

4 Your orator shows that by an act of the General Assembly of said State entitled "An act to incorporate the Wilmington, Charlotte and Rutherford Railroad Company," ratified the 13th day of February, A. D. 1855, a corporation was created for the purpose of constructing a railroad from the city of Wilmington, in the State of North Carolina, westward to Charlotte and to Rutherford, in the said State.

The said Wilmington, Charlotte and Rutherford railroad was an unfinished railroad at the time of the adoption of the constitution aforesaid, and at said time, and upon the 29th day of January, 1869, and for several years thereafter, the bonds of the State were under par.

That upon said 29th day of January, 1869, and pursuant to the provisions of the constitution aforesaid, the General Assembly of North Carolina enacted the following statute (such sections thereof as are omitted here having reference to matters not in this connection important):

"An act to amend the charter of the Wilmington, Charlotte and Rutherford Railroad Company, to provide for the completion of said road, and to secure to the State a representation in this company."

SEC. 1. The General Assembly of North Carolina do enact tha the capital stock of the Wilmington, Charlotte and Rutherford Rail

road Company be increased to the sum of seven millions of dollars, and that in order to complete the road the public treasurer of the State is hereby directed, as soon as this amendment shall be accepted by the stockholders in said company, provided it shall be done within ninety days of the ratification of this act, to subscribe, in behalf of the State, four millions of dollars to the capital stock of said company upon the terms and conditions hereinafter provided.

SECTION 2. For the payment of the subscription of said four millions of dollars directed in the foregoing section the public treasurer shall cause to be made and issued coupon bonds of the State, in sums of one thousand dollars each, bearing interest at the rate of six per cent. per annum, payable semi-annually, and the principal thereof at the end of thirty years; said bonds to be signed by the Governor of the State and countersigned by the public treasurer, and sealed with the great seal of the State, and to be delivered to the president of said Wilmington, Charlotte and Rutherford Railroad Company as hereinafter provided.

SEC. 3. That two millions of the subscription so made shall be applied exclusively to that portion of said road which is west of Charlotte, called the western division, the first portion of said amount expended to be expended in completing said road to Rutherfordton, and two millions of dollars of it shall be exclusively applied to that portion of the road east of Charlotte, called the eastern division.

SEC. 4. That the directors of said company, as provided for in the charter, shall be limited to the number of thirteen, of which number the Governor of the State shall appoint seven and the stockholders shall elect six, and upon the acceptance of this act by the stockholders and the payment of one million of dollars of the bonds of the subscription authorized on the part of the State there shall, within sixty days after such payment, be a meeting of the stockholders of the company and directors elected and appointed as herein provided for and a reorganization of the company immediately effected, which shall conform to the true intent and meaning of the charter of said company as amended by this act.

SEC. 5. That the acceptance of this act by the stockholders shall in nowise affect any of the liabilities, contracts, or obligations of the said Wilmington, Charlotte and Rutherford Railroad Company.

SEC. 6. For the purpose of providing for the payment of the interest upon the bonds hereby authorized and the principal at its maturity, an annual tax of one-eighth of one per cent. is hereby imposed upon all the taxable property of the State, which shall be levied, collected, and paid into the State treasury as other public taxes, and the surplus, after paying the interest, shall be invested in securities of the United States or other safe securities and kept as a sinking fund for the payment of the principal money at maturity.

SECTION 7. Provided, that on or before the day upon which the first coupon of the bonds authorized to be issued by this act shall become due, the president of the above-named railroad company shall pay to

the public treasurer, either in cash or in matured coupons of bonds upon which the public treasurer is made to pay the interest under this act, the sum of one hundred and twenty thousand dollars, and on or before the day upon which the second coupon of the bonds authorized
7 by this act shall become due the president of the above-named railroad company shall pay in like manner the sum of one hundred and twenty thousand dollars, and on or before the day upon which the third coupon, as aforesaid, shall become due the president above named shall pay to the public treasurer in like manner the sum of eighty thousand dollars, and on or before the day upon which the fourth coupon, as aforesaid, shall become due the president above named shall pay to the public treasurer in like manner the sum of forty thousand dollars.

SEC. 8. Provided further, that of the bonds authorized to be issued under this act seven hundred and twenty thousand dollars shall be retained by the public treasurer as collateral security for the faithful performance of the conditions of the preceding section, and that, upon the payment of the first one hundred and twenty thousand dollars as aforesaid, the public treasurer shall be authorized to deliver to said railroad company two hundred and forty thousand dollars of the above-named seven hundred and twenty thousand dollars of bonds; and upon the payment of the succeeding amounts named in said section the public treasurer is authorized to deliver bonds to the amount of double the sum paid, until all said bonds are delivered to said railroad company: Provided also, that at the expiration of two years from the date of the first coupon of the bonds authorized in this act the public treasurer shall be authorized to issue to said railroad company an additional amount of bonds equal, at their par value, to the amount paid in cash by said
8 company in behalf of the State, according to the provisions of section seven of this act; said bonds to be in all respects similar to those authorized to be issued by this act.

SEC. 9. All dividends that may hereafter accrue to the State upon the stock owned by the State in said railroad company, or so much thereof as may be necessary for that purpose, shall be applied exclusively to the payment of the interest on the bonds of the State authorized by this act.

SEC. 12. That the directors in this company shall have power to receive subscriptions to said stock in said company in lands, moneys, bonds, stocks, or any other property; and, in case land be subscribed as stock, the directors may provide the mode in which the value of the same may be ascertained, and conveyance thereof executed.

SEC. 13. That any laws or clauses of laws conflicting with or repugnant to this act are hereby repealed.

SEC. 14. That this act shall be in force and take effect from and after its ratification.

Ratified the 29th day of January, A. D. 1869.

That the said act is one of the public laws of the year 1869; and, as required by the 16th section of article 2d of the State constitution, it was passed after having been read three several times in

each house of the General Assembly; and after having passed three several readings, which readings were on three several days, the yeas and nays on the second and third readings thereof having also been duly entered on the journal.

That the stockholders of the Wilmington, Charlotte and Rutherford Railroad Company duly accepted the said last-mentioned act as an amendment to their charter, and that the public treasurer of the State thereupon subscribed on behalf of the State four millions of dollars to the capital stock of the said company.

That in part payment of said subscription to the capital stock of the railroad company the public treasurer of the State, under the authority conferred upon him in said act, did, on or about the first day of June, 1869, issue one thousand coupon bonds of said State (numbered from one to one thousand).

Subsequently, in the same year, two thousand more of said bonds were issued, and of the remaining one thousand, seven hundred and twenty bonds of said subscription were retained by the State in accordance with the provisions of section 8 in the above act. Each of the said bonds is of the denomination of one thousand dollars, dated April 1, 1869, and payable April 1, 1899, signed by W. W. Holden, the then Governor of the State, countersigned by David A. Jenkins, the public treasurer, and sealed with the great seal of the State of North Carolina, said bonds being of the tenor and effect following:

UNITED STATES OF AMERICA.

This certificate of debt is not subject to taxation for any purpose whatever.

It is hereby certified that the State of North Carolina justly owes to —— ——, or bearer, one thousand dollars, redeemable in good and lawful money of the United States at the National Bank of the Republic, in the city of New York, on the first day of April, 1899, with interest thereon at the rate of six per cent. per annum, payable half yearly, at the said bank, on the first days of April and October in each year from the date of this bond and until the principal be paid, on surrendering the proper coupon hereto annexed.

Issued under an act to amend the charter of the Wilmington, Charlotte and Rutherford Railroad Company, to provide for the completion of said road, and to secure the State a representation in the company.

Ratified January 29, 1869.

In witness whereof the Governor of the said State, in virtue of power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and the public treasurer hath countersigned the same, at the seat of Government of the said State, this first day of April, 1869.

Issued for the Wilmington, Charlotte and Rutherford Railroad Company. Special tax on all the taxable property of the State levied in the act authorizing the issue to pay the annual interest.

[SEAL.]

W. W. HOLDEN, *Governor.*

Countersigned: D. A. JENKINS,
Public Treasurer.

That there is attached to each bond coupons of the following tenor and differing only in their numbers and due dates:

"The State of North Carolina will pay to bearer at the National Bank of the Republic, in the city of New York, on the 1st day of April, 1870, thirty dollars on bond No. — for $1,000.

$30. D. A. JENKINS,
Public Treasurer."

11 That he is the *bona fide* holder for value of ten (10) of said bonds, numbered 56, 83, 88, 398, 399, 400, 671, 750, 857, 859, each being for the sum of one thousand dollars and all of them having the coupons attached, payable April 1st, 1870, and semi-annually thereafter. The principal of the said bonds amounts to ten thousand dollars, and the overdue coupons attached thereto amount to nine thousand nine hundred dollars.

Your orator shows that in the year 1869 the collection of the said special tax provided to secure said bonds was duly made, and that thereafter the paying out of the proceeds thereof to the holders of overdue coupons belonging to said bond was regularly proceeding in accordance with the above provisions of law.

But that in the month of January, 1870, after the payment of some such coupons had been made, and while large amounts of money arising from the collection of the special tax aforesaid remained in the hands of the State treasurer, applicable to the payment of said coupons, the State of North Carolina, in violation of the Constitution of the United States, did by legislative resolution direct the appropriation of the said moneys then in the hands of the treasurer to other purposes, pursuant to which invalid direction such moneys were thereupon improperly expended by the State officials, and are thereby lost to your orator and the other bondholders of the same class.

Your orator shows that after all of said three thousand
12 bonds had been issued according to law the State of North Carolina undertook to impair the obligation of the aforesaid contract, and to that end formally enacted the following resolution:

"Resolved, That the treasurer be instructed and directed not to pay any more interest on the special tax bonds until authorized and directed so to do by this General Assembly.

"Ratified 20th day of January, 1870."

To the same end, upon the 8th of March, 1870, the State also passed "An act to repeal certain acts passed at the session of one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, making appropriations to railroad companies," as follows:

SECTION 1. The General Assembly of North Carolina do enact that all acts passed at the last session of this Legislature making appropriations to railroad companies be, and the same are hereby, repealed; that all bonds of the State which have been issued under the said acts now in the hands of any president or other officers of the corporation be immediately returned to the treasurer.

SEC. 2. The moneys in the State treasury which were levied and

collected under the provisions of the acts mentioned in section one of this act are hereby appropriated to the use of the State government, and shall be credited to the counties of the State upon the tax to be assessed for the year one thousand eight hundred and seventy, in proportion to the amounts collected from them, respectively.

13 SEC. 3. All laws and clauses of laws coming in conflict with this act are hereby repealed.

SEC. 4. This act shall be in force from and after its ratification.

Ratified the 8th day of March, A. D. 1870.

With the same view, upon the 23rd of November, 1874, the General Assembly passed an act containing the following provisions:

SECTION 2. That the treasurer shall not pay or discharge any claim for interest upon any portion of the bonded debt of this State, except as hereinafter provided for by law.

SECTION 3. That the auditor shall not audit or recognize any claim for principal or interest upon any portion of the bonded debt of this State heretofore made or pretended to be made by authority of this State, except as hereafter provided for by law.

SECTION 4. That any money in or which may be paid into the treasury on account of special taxes heretofore levied for the payment of the interest on bonds or pretended bonds of this State is hereby transferred and appropriated to the general fund.

SECTION 5. That this act shall take effect from its ratification.

In like connection, on the third day of November, 1880, the following constitutional amendment was adopted by the State:

"Nor shall the General Assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority

14 of the convention of the year 1868, or any debt or bond incurred or issued by the Legislature of the year 1868, at its special session of 1868 and at its regular session of 1868 and 1869 and '70, except the bonds issued to fund the interest of the public debt, unless the purposing to pay the same shall have been submitted to the people or by them ratified, by the vote of a majority of qualified voters of the State, at a regular election held for that purpose."

Your orator shows that since the 20th day of January, 1870, none of the coupons belonging to said bonds, which have fallen due, have been paid, though the same has been duly demanded; that the above-mentioned special taxes have not been collected; that none of the contracts performable under said act of January 29th, 1869, have been performed, and that the Government of the State has constantly enforced upon its officials compliance with the subsequent nullifying enactments above set forth.

And your orator shows that by virtue of the provisions of the constitution of North Carolina and of the said act of the General Assembly of January, 1869, and of the issue of bonds thereunder, a contract was constituted between the State and the holders of said bonds, which was in the same connection a contract executed by said State, by the levying of the tax and the committing of its collection to State taxing officials and the direction to other State

officials for the regular payment of the coupons and the investment of the surplus arising from the taxes in good securities, to be
15 kept as a sinking fund for the payment of the principal.

Your orator shows that the statutes of North Carolina, hereinbefore set forth, which attempt to impair the contract in question, have not taken legal effect for the reason that therein the said laws are violations of the Constitution of the United States, both in its contract clause and in the fourteenth amendment thereto.

However, notwithstanding the invalidity of such enactments, the individual respondent herein and the other officers of the State of North Carolina, whose respective duties it is to carry out the laws of the State and its valid directions in regard to the raising of the said taxes and the payment of such moneys to the holders of such bonds, have refused to perform their respective official duties thereabout, claiming to be warranted in such refusal by such subsequent invalid enactments.

Your orator submits that no legislative action upon the part of the State of North Carolina has at any time since the issue of said bonds been required for the benefit or the security of the bondholders, but solely the executive performance of its valid statutes.

Your orator shows that the manner in which "other public taxes are collected and paid, as referred to in the above act of January, 1869, is as follows:

The auditor of the State is required by statute to transmit to the clerk of the board of commissioners of each county tax forms to be used in assessing and listing property for taxation; thereupon
16 the board of county commissioners duly complete such lists by filling blanks, revising, and settling, and then deliver one duplicate thereof to the sheriff or tax collector, by endorsing thereupon an order to collect the taxes therein set forth, which list and order have the force and effect of a judgment and execution.

The tax forms so transmitted by the State auditor are authoritative, and are required by statute to show in different columns the sums due by each tax-payer to the State and to the county, respectively, and also the various accounts upon which they are due.

Your orator shows that the statutory tax forms transmitted by the auditor of the State since 1870 to the boards of county commissioners have contained separate lists for the collection of the various classes of taxes to be raised for State purposes other than under the statute of January 29, 1869, but by neglect of duty on the part of the auditor no list has been furnished to the commissioners for the collection of the special taxes securing the above-described bonds.

Your orator shows that for several years past and now the respondent, William P. Roberts, has been and is auditor of the State of North Carolina.

Your orator further shows that, in accordance with the above-described statutory contracts securing the bonds in his hands and relying upon the nullity of any attempted invasions thereof by the State or any government or officials of North Carolina, he has made due demand for the performance of the above-described con-

17 tracts for the collection of said taxes; that the said demand was refused.

Your orator shows that the above-described special tax bonds are held by a very large number of individuals, who are too numerous to be joined herein.

Your orator shows that the said taxes are to be collected many times, through a number of years, and the semi-annual coupons of said bonds are payable in like manner; the said continuing security and satisfaction would require for enforcement the institution of a great multiplicity of suits, and so constitutes a case fit for the intervention of a court of equity, in order to ascertain and declare the rights of the complainant and of such other bondholders as may become parties to this suit; also that all holders of the special tax bonds secured by the aforesaid act of 1869 have a common interest in the collection of said taxes and in the fund arising therefrom; that the amount of said bonds outstanding must be ascertained, as well as the amount obtainable under the assessments and collections provided for in the said act. The respective amounts to which the said bonds are entitled must be apportioned among the same, and for that purpose an accounting must be had.

And, further, that the said tax officers of North Carolina are not able fully to respond in their personal estates for the loss which has accrued and will accrue to your orator and other holders, as above, of said bonds from their continued refusal to execute their official duties about the contract aforesaid.

18 Your orator further shows that an injunction is necessary herein to protect your orator and the said bondholders in the enjoyment of their Federal rights, namely, to protect them against the impairment of the contract for the imposition of the special taxes before described and to protect them against the deprivation of rights secured to them as citizens of the United States by the 14th amendment.

To the end, therefore, that the special tax bonds of the State of North Carolina, issued under the act of the General Assembly of the State of North Carolina passed on January 29th, 1869, and held by your orator as aforesaid, or by any person becoming party hereto, be declared to be still subsisting and valid contracts; and that the executed contracts of the State providing for the collection and payment of the special tax levied by said act be declared to be still effectual and binding, and, more particularly, to be unimpaired and unaffected by the subsequent legislation and constitutional provision above set forth, and that the above resolutions of the General Assembly of North Carolina passed on January 29th, 1870—

The act of the General Assembly of North Carolina of March 8th, 1870;

The sections of the act of November 23rd, 1874, above set forth;

19 The provision of the State constitution set out in the bill, so far as it may be thought to obstruct or to concern the contention of your orator—

Be declared to impair the obligation of the contract hereinabove set forth, and so to be unconstitutional and void.

That the respondents be perpetually enjoined from obstructing or in any manner impeding the collection and payment of the special tax in question.

That the respondent, the State of North Carolina, its executive agents and officials, and William P. Roberts, the auditor of the State, be decreed to execute the said act of January 29th, 1869, and to cause the proper statutory lists to be sent to the boards of county commissioners containing provisions for the special tax above described.

That your orator may have such other or further and different relief as may be just.

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be directedt o the State of North Carolina and to William P. Roberts, auditor of said State, and to such other persons as may be necessary and proper persons, when they may become known and become amenable to the jurisdiction of this honorable court, by the above process commanding them and any of them, at a certain day and under a certain penalty to be therein named, to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, abide, and perform such orders
20 and decrees therein as shall seem to your honors agreeable to equity and good conscience.

EDWARD L. ANDREWS,
Solicitor and of Counsel for Complainant.

SAMUEL F. PHILLIPS,
GRAY & STAMPS,
Of Counsel.

And thereupon, at the request and by the direction of the said complainant, Alfred H. Temple, by his solicitors aforesaid, writ of subpœna is issued, in pursuance of the prayer of the said bill of complaint, against the said defendants, returnable on the first Monday in May, 1886; which said writ of subpœna is in the following words and figures, to wit:

UNITED STATES OF AMERICA,
Eastern District of North Carolina, } *ss:*

The United States of America to the State of North Carolina and W. P. Roberts, auditor of said State, Greeting:

We command you and every one of you that you appear before the judges of our circuit court of the United States of America for the eastern district of North Carolina, at the office of the clerk of said court, in the city of Raleigh, in said district, on the first Monday in the month of May next, to answer the bill of complaint of Alfred H. Temple on behalf, &c., filed in the clerk's office of said court, in said city of Raleigh, then and there to receive and abide by
21 such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the eastern district of North Carolina to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the 12th day of April, 1886, and in the one hundred and tenth year of the Independence of the United States.

Issued the 12th day of April, 1886.

[SEAL.] N. J. RIDDICK, *Clerk.*

MEMORANDUM.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said circuit court, at Raleigh aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed and a decree entered accordingly.

N. J. RIDDICK, *Clerk.*

And on the return day of said writ, to wit, on the first Monday in May, 1886, the same being a rule day, at the clerk's office of this court, the marshal returns said writ endorsed as follows:

"Executed April 12th, 1886, by delivering a copy of the within to A. M. Scales, Governor of the State of North Carolina, and to T. F. Davidson, attorney general of the State of North Carolina, and to W. P. Roberts, auditor of the State of North Carolina.

"(S'g'd) V. V. RICHARDSON,

"*U. S. Marshal.*"

22 And at the said rule day, to wit, on the first Monday in May, 1886, Theo. F. Davidson, attorney general of the State of North Carolina, Ruffin & Graham and Battle & Mordecai enter their appearance as solicitors for W. P. Roberts, auditor, and especially for a motion to dismiss in behalf of the State of North Carolina.

And at the next succeeding rule day, to wit, on the first Monday in June, 1886, demurrer of W. P. Roberts, auditor of the State of North Carolina, and motion to dismiss as to the State are filled which motion to dismiss as to the State and demurrer of W. P. Robers, auditor of the State of North Carolina, are in the words and figures following, to wit:

Motion to Dismiss as to the State.

Circuit Court of the United States, Eastern District of North Carolina. In Equity.

A. H. TEMPLE, on Behalf of the Holders of the Special Tax Bonds, &c.,

against

THE STATE OF NORTH CAROLINA *et al.*

RULE DAY, *June 7th*, 1886.

T. F. Davidson, attorney general of the State of North Carolina, on behalf of the said State, comes and saith that the said State does

not consent to be a party defendant to the complainant's bill of complaint, and moves the court here to dismiss the said bill
23 as to said State.

T. F. DAVIDSON, *Att'y Gen'l,*
Per B. & M.
BATTLE & MORDECAI,
RUFFIN & GRAHAM, *Sols., &c.*

Demurrer of W. P. Roberts, Auditor of State of N. C.

Circuit Court of the United States, Eastern District of North Carolina.
In Equity.

ALFRED H. TEMPLE, on Behalf of the Holders of Special Tax Bonds, &c.,
against
THE STATE OF NORTH CAROLINA and WM. P. ROBERTS, Auditor, &c.

The demurrer of William P. Roberts, the auditor of the State of North Carolina, one of the defendants, to the complainant's bill of complaint.

RULE DAY, *June 7th*, 1886.

The defendant, William P. Roberts, the auditor of said State of North Carolina, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur to the said bill, and for cause of demurrer shows—

I. That the said bill does not contain sufficient matter of equity whereupon this court can ground any decree in favor of said
24 complainant or give the said complainant any relief against this defendant.

II. That it appears by the said complainant's own showing in the said bill that this defendant has no personal interest in the matters and things set up in said bill, and that the same is brought against him as auditor of the State of North Carolina, which office, by virtue of the constitution and laws of said State, constitutes a part of the executive department thereof, and that the complainant seeks to affect said State and not this defendant, and this defendant respectfully submits that this court cannot & will not take jurisdiction of said matters and things against said State nor against this defendant as an officer thereof.

III. That it appears from the complainant's own showing in said bill that to grant the relief asked for by the complainant's bill would be to require of this defendant, as an officer of the State of North Carolina, constituting a part of the executive department thereof, to act contrary to the positive commands and orders of the Legislature of said State, the same being the supreme political power thereof, and to raise money by taxation when the same supreme power has declared that the same shall not be done.

IV. That it appears from the said complainant's own showing in said bill that this court has not jurisdiction of the person of this

defendant as touching the matters and things set forth in said bill, nor of the relief demanded, nor of the State of North Carolina, which the complainant seeks to make a defendant with him.

T. F. DAVIDSON,
Att'y Gen'l, &c.
RUFFIN & GRAHAM AND
BATTLE & MORDECAI,
Sols. for Def't W. P. Roberts, Auditor, &c.

25 We certify that in our opinion the foregoing demurrer is well founded in point of law.

May 18th, 1886.

BATTLE & MORDECAI, *Sol's, &c.*

William P. Roberts, defendant in this suit, makes oath that the foregoing demurrer is not interposed for delay.

W. P. ROBERTS, *Auditor.*

Sworn & subscribed before me this 7th day of June, 1886.

N. J. RIDDICK, *Clerk.*

And at June term, 1886, the cause is continued.

And thereafter, to wit, at a term of the circuit court of the United States for the fourth circuit and eastern district of North Carolina, begun and held in the city of Raleigh on the last Monday in November, A. D. 1886, before the Honorable Hugh L. Bond and the Honorable Augustus S. Seymour, judges presiding, come the parties aforesaid, by their said solicitors, and this cause coming on for trial the same is argued upon the motion of the State of North Carolina to dismiss, and upon the demurrer of W. P. Roberts, auditor of said State, and decision reserved by the court.

26 And afterwards, to wit, at the next regular term of said circuit court, to wit, the June term, A. D. 1887, begun and held in the city of Raleigh, on the first Monday in June, A. D. 1887, before the Honorable Hugh L. Bond and the Honorable Augustus S. Seymour, judges presiding, and on the 10th day of said month of June the following entry is ordered to be made and entered of record in this cause:

Division of opinion announced by the court, his honor Judge Bond being in favor of the complainant on the question on which the opinions were opposed.

And thereupon a decree is made by his honor Judge Bond and ordered to be entered of record in the words and figures as follows, to wit:

Decree for Complainant.

In the Circuit Court of the United States for the Eastern District of North Carolina.

ALFRED H. TEMPLE, &c.,
against
THE STATE OF NORTH CAROLINA and ROBERTS, Auditor, &c.

This cause coming on to be heard, the parties named as defendants thereto, by their counsel, announce to the court that they will not farther plead or answer thereto, but will abide, the one by its motion and the other by his demurrer; that they also waive the taking of any account in regard to the coupons alleged by the plaintiff to be by him held.

27 Whereupon it is declared by the court that the said State of North Carolina is indebted to the said Alfred H. Temple for coupons held by him as in his bill alleged, and now by him deposited with the clerk of this court, to the amount of nine thousand nine hundred dollars, principal money, together with five thousand five hundred and forty-five dollars for interest due thereon up to the present term of this court, and also for interest upon said principal money until paid, which amounts the said State is hereby adjudged and decreed to pay to the said Temple.

And it is further ordered that the said William P. Roberts, as auditor of the State of North Carolina, proceed in due course of his office to execute the provisions of the act passed by said State on the 29th of January, 1869, entitled "An act to amend the charter of the Wilmington, Charlotte and Rutherford Railroad Company to provide for the completion of said road and to secure for the State a representation in this company," so far as such execution may be necessary to satisfy this decree.

And this cause is retained for further directions, &c.

HUGH L. BOND,
C't Judge.

Appeal by defendants in open court. Citation and bond waived by complainant in open court.

28 Whereupon certificate of division, made under the direction of their honors, is ordered to be entered of record and certified to the Supreme Court, which certificate of division is in the words and figures as follows, to wit:

In the Circuit court of the United States for the Eastern District of North Carolina. June Term, 1887.

ALFRED H. TEMPLE, on Behalf of the Holders of the Special Tax Bonds, &c.,
against
THE STATE OF NORTH CAROLINA and Others.

At a circuit court of the United States begun and held at Raleigh, or the district aforesaid, on Monday the 6th June, 1887:

Present: The Honorable Hugh L. Bond and Augustus S. Seymour.

This is a bill in equity filed April 12th, 1886, by the complainant on behalf of himself and all other holders of certain bonds issued by the State of North Carolina, under an act ratified January 29th, 1869, for the purpose of enforcing the levy of a special tax for the payment of the coupons attached to said bonds, &c., &c., of which coupons it is alleged that the complainant, Temple, was the *bona fide* owner of nine thousand nine hundred dollars in face value, past due at the date of the filing of the bill.

29 Part of the relief prayed for by complainant is that the respondents, the said State, its executive agents and officers, and William P. Roberts, auditor of said State, be decreed to execute the act of January 29, 1869, by levying and collecting a tax, &c.

The subpœna issued on April 12, 1886, directed to the State of North Carolina and W. P. Roberts, auditor of said State, and was returned April 12, 1886.

The return of the marshal shows that said writ was served on the Governor and attorney general of said State and upon William P. Roberts, auditor, &c.

At the rule day, in June, 1886, the attorney general of said State filed a motion to dismiss said bill as to the said State, alleging that it does not consent to be a party defendant to the suit, and on said day the defendant, William P. Roberts, auditor, &c., filed a demurrer to the bill.

The case coming on to be argued, at November term, 1886, an *advisari* was taken thereupon, and the same was continued to the present term.

Whereupon, it appearing to the court that the case made in the record against Roberts as auditor, &c., was merely incidental to that against the State of North Carolina, it occurred as a question—

Whether such suit could be maintained in this court
30 against said State by the complainant, he being one of the citizens thereof.

Upon which question the opinion of the judges were opposed, his honor Judge Bond being of opinion that it was so maintainable, and his honor Judge Seymour being of opinion to the contrary.

Whereupon the above question was during the same term stated as above, under the direction of the judges, and certified, and such certificate ordered to be entered of record.

31 UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Circuit Court, Fourth Circuit.

I, N. J. Riddick, clerk of the circuit court of the United States in and for the district aforesaid, do certify that the foregoing contains a full, true, and complete transcript of the record of said court in the cause therein pending, wherein Alfred H. Temple, on behalf of

the holders of the special tax bonds, &c., is complainant and the State of North Carolina and William P. Roberts, auditor of said State, are defendants.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in Raleigh, in said district, this 17th day of August, A. D. 1887, and in the one hundred and twelfth year of the Independence of the United States.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK, *Clerk.*

Endorsed on cover: E. North Carolina C. C. U. S. No. 1034. The State of North Carolina and William P. Roberts, auditor of the State of North Carolina, appellants, *vs.* Alfred H. Temple. Filed September 6, 1887.

Office Supreme Court U. S.
FILED.
MAR 31 1888
JAMES H. McKENNEY,
Clerk.

BRIEF FOR APPELLANTS.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 1034.

THE STATE OF NORTH CAROLINA AND WILLIAM P. ROBERTS, AUDITOR OF THE STATE OF NORTH CAROLINA, APPELLANTS,

vs.

ALFRED H. TEMPLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

R. H. BATTLE,
(of Battle & Mordecai),
of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE STATE OF NORTH CAROLINA AND W. P. ROBERTS, AUDITOR OF THE STATE OF N. C. APPELLANTS,

vs.

ALFRED H. TEMPLE.

BRIEF FOR APPELLANTS.

This was an appeal from a decree rendered by his Honor, HUGH L. BOND, Circuit Court Judge, upon a division of opinion between him and Hon. A. S. SEYMOUR, District Judge, at June Term, 1887, of the Circuit Court for the Eastern District of North Carolina, in equity, adjudging that the State of North Carolina pay to said TEMPLE $9,900 of principal money, $5,500 of interest due thereon, &c., and that WM. P. ROBERTS, as Auditor of the State, proceed, in due course of his office, to execute the provisions of an act passed by said State, January 29, 1869, entitled, &c.

The certificate of division was ordered to be recorded and certified to this Court, and presents the question on which their Honors were opposed in opinion, as follows: "Whereupon, it appearing to the Court that the case made in the record against ROBERTS, as Auditor, &c., was merely incidental to that against the State of North Carolina, it occurred as a question, whether such suit could be maintained in this Court against said State, by the complainant, he being one of the citizens thereof, upon which question the opinions of

the Judges were opposed, his Honor, Judge BOND, being of the opinion that it was so maintainable, and his Honor, Judge SEYMOUR, being of opinion to the contrary."

The bill was filed April 12, 1886, by the said TEMPLE, a citizen of North Carolina, in the said Circuit Court for the Eastern District of North Carolina, on behalf of himself and all other holders of certain bonds issued by said State under an act ratified January 29, 1869, for the purpose of enforcing the levy of a special tax, provided for in the act, for the payment of the coupons attached to said bonds, &c.

The bill alleges that after three thousand bonds, authorized by said act, had been issued, the State of North Carolina undertook to impair the obligation of the contract, created by said act, between the State and the holders of said bonds, by enacting a resolution, January 20, 1870, instructing the Treasurer not to pay any more interest on said bonds until authorized and directed so to do by the General Assembly, and to the same end, on Mach 8, 1870, by an act passed repealing the laws under which said bonds and other like special tax bonds had been issued; and with the same view, on 23d November, 1874, another act was passed directing the Treasurer not to pay, and the Auditor not to audit or recognize, any claim for principal or interest of the the bonded debt of the State, except as thereafter provided for by law; and for that, on 3d November, 1870, a constitutional amendment was adopted by the State, forbidding the General Assembly to assume or pay, or authorize the collection of, any tax to pay any debt or bond issued or incurred by the Legislature of 1869, &c., except bonds issued to fund the public debt, unless the purposing to pay the same shall have been submitted to the people, &c.

Part of the relief prayed in the bill was that the said State, its executive officers and agents, and W. P. ROBERTS, Auditor of the State, be directed to execute the act of January 29, 1869, by levying and collecting a tax, &c.

The State of North Carolina, by its Attorney General,

came and said that it did not consent to be a party defendant to the plaintiff's bill, and moved to dismiss the same as to the State.

The defendant WM. P. ROBERTS, Auditor of the State, demurred to the bill for want of equity, and because the Court had not jurisdiction of his person touching the matters alleged, &c.

So upon the certificate of division of opinion between the two Judges below, the only question is whether a State can be sued, by one of its citizens, in the Circuit Court of the United States in that State, to compel it to perform its contracts and pay its debts.

The State of North Carolina contends:

1. That the Sovereign of no government is liable to be sued in any judicial tribunal without his consent, and certainly not, by any compulsory process in England, whence we derive our ideas of Courts and their jurisdiction.

2. That upon the adoption of the Constitution of the United States, no State could be sued in respect to any contract, in any Court by one of its citizens.

3. That the Article of the Constitution conferring jurisdiction on the Courts of the Union (Art. III, Sec. 2,) did not give jurisdiction of such suit.

4. That the Eleventh Amendment of the Constitution, by a fair construction, excludes the idea of such suit.

5. That it was not the intent of the Act of March, 1875, amending the Judiciary Act of 1789, to confer jurisdiction of such suit on the Circuit Courts of the United States, but, if otherwise, that act is *pro tanto* unconstitutional and void.

1. Sir WM. BLACKSTONE, discussing the sovereignty and supremacy of the King, says:

"Hence it is that no suit or action can be brought against the King, even in civil matters, because no Court can have jurisdiction over him; for all jurisdiction implies superiority of power; authority to try would be vain and idle without an

authority to redress, and the sentence of a court will be contemptible unless the Court had power to command the execution of it; but who, says FINCH, shall command the King?"

1 Black. Com., p. 242.

But there is no need to cite the text books to prove the general proposition that "the Sovereign is not liable to be sued in any judicial tribunal without his consent," and that the maxim is not limited to a monarchy, but is of equal force in a republic. The learning on this subject is to be found in the opinion of the Court by Justice MILLER, and the dissenting opinion by Justice GRAY, in *United States* v. *Lee*, 106 U. S., pp. 205, 227 *et seq.*

We would invite attention to the case of *The Queen* v. *Commissioners of the Treasury*, Law Rep., 7; Q. B., 387, 394; cited in the latter opinion, in which Chief Justice COCKBURN says—on the motion for a writ of *mandamus* to the commissioners, which was refused for want of jurisdiction to grant it—"I take it, with reference to that jurisdiction, we must start with the unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim, even in appearance, to have any power to command the Crown; the thing is out of the question. Over the Sovereign we have no power."

The English remedies of petition of right, &c., were never adopted in this country; but, as Justice GRAY says in *Lee's* case, in the American Colonies and in the States the remedy of a claim—suits against the Government—was by petition to the Legislature. That body had and still has entire control of a State's Treasury.

2. We borrow from the opinion of Judge BILLINGS, in *Hans* v. *Louisiana*, delivered in the Circuit Court of the United States for the District of Louisiana (the case with which ours was advanced on the docket of this Court to be heard,) some references to language used by great publicists and jurists of

the past to prove our second proposition. ALEXANDER HAMILTON, in the Federalist, No. 81, p. 508, says: "It is inherent in the nature of Sovereignty not to be at the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of Sovereignty, is now enjoyed by the government of every State in the Union. * * * There is no color to pretend that the State governments would, by the adoption of the plan of the convention, be divested of the privilege of paying their debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are binding on the conscience of the Sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the Sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts by mere implication, and in destruction of a pre-existing right of State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

Mr. MADISON said: "It is not in the power of individuals to call any State into court."

2 Elliott's Debates, 390.

And so Mr. WEBSTER: "The security for State loans is the plighted faith of a State as a political community. It rests on the same basis as other contracts with established governments—the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan and its ability to fulfil its engagement. It has been said that the States cannot be sued on these bonds. But neither could the United States be sued, nor, as I suppose, the Crown of

England. Nor would the power of suing give to the creditors, probably, any substantial additional security. The solemn obligations of a government, arising on its own acknowledged bond, would not be enhanced by a judgment rendered on such bond. If it either could or would not make provision for paying the bond, it is probable that it could not or would not make provision for satisfying the judgment."

Letter to Baring Bros., Vol. 6, p. 538.

(This opinion of our great constitutional lawyer tends also to establish our other propositions.)

Equally strong on this point is the language of this Court:

"No Sovereign State is liable to be sued without her consent. Under the Articles of Confederation a State could be sued only in cases of boundary. It is believed there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

Briscoe v. *Com. of Kentucky*, 11 Pet., 321.

And in the case which, by deciding that under Article 3, Sec. 2 of the Constitution, a State might be sued in the Federal Courts by a citizen of another State, caused the adoption of the Eleventh Amendment, Justice IREDELL takes this for granted. He says:

"I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular legislative mode authorizing a compulsory suit, for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed."

Chisholm's Ex'trs v. *Georgia*, 2 Dall., 435.
See also *Beers* v. *Arkansas*, 20 How., 527.

3. The language of the Eleventh Amendment, which was proposed by the Third Congress on the 5th September, 1794,

the year following that in which *Chisholm's Ex'rs* v. *State of Georgia* was decided, seems to us clearly to sustain our position, in view of the fact that many contended—(See Justice IREDELL's opinion in that case)—that Art. 3, Sec. 2, clause 1, which defines the jurisdiction of the proposed Courts of the United States, did not embrace the case of a State being a party defendant.

That Amendment says, *not* that the judicial power of the United States *shall not extend, &c.*, but—"The judicial power shall not be *construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State," &c. In other words, the Amendment does not change the language of the original Article, but merely gives a construction to that language, declaring it to mean what many thought it always meant.

That Article conferred jurisdiction of "controversies between a State and citizens of another State," and still, as *construed* by the Amendment, a State could not be sued in the National Courts by a citizen of another State. How, then, without a similar power given to those Courts in controversies between a State and its own citizens, can it be contended that any such jurisdiction exists?

4. That the effect of the Eleventh Amendment was to exclude such jurisdiction, appears from the following citations from the opinions of this Court:

"Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State, and that the judiciary of the State cannot interfere to enforce those contracts without the consent of the State, and *the Courts of the United States* are expressly prohibited from exercising such a jurisdiction."

Bank of Washington v. *Arkansas*, 20 How., 530.

"A State, without its consent, *cannot be sued* by an individual, and a Court cannot substitute its own discretion for

that of executive officers in matters belonging to the proper jurisdiction of the latter."

Board of Liquidation v. *McComb*, 92 U. S., 531.

"Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created."

Nicholls v. *United States*, 7 Wall., 122.

"It may be accepted, as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any Court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States, by virtue of the original jurisdiction conferred on this Court by the Constitution."

Cunningham v. *Macon & Brunswick R. R. Co.*, 109 U. S., 446.

And so in *Louisiana* v. *Jumel*, a suit to compel the payment of certain money in the State treasury, collected by a special tax levied by law to pay the interest on bonds of the State, and the levy of other taxes for the same purpose, this Court, through the Chief Justice, says: "The remedy sought implies power in the judiciary to compel the State to abide by and perform its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the fiscal affairs of the State, to the extent that may be necessary to accomplish the end in view." Page 722. And again: "The remedy sought, in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disburse-

ment of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State was not and *could not be made a party.* It needs no argument to show that the political power cannot be thus evicted of its jurisdiction, and the judiciary set in its place."

Louisiana v. *Jumel*, 107 U. S., 711.

"It seems most probable that it has been adopted in our Courts as a part of the general doctrine of publicists that the supreme power in every State, wherever it may reside, shall not be compelled, by process of its own creation, to defend itself from assaults in those Courts.

* * * * * *

"It is obvious that, in our own system of jurisprudence, the principle is as applicable to each of the States as it is to the United States, except in those cases where, by the Constitution, a State of the Union may be sued in this Court.

* * * * * *

"While the exemption of the United States and the several States, from being subjected as defendants to ordinary actions in the Courts, has since that time (when *Cohens* v. *Virginia* was decided) been repeatedly asserted here, the principle has never been discussed, or the reasons for it given, but it has always been treated as an established doctrine."

United States v. *Lee*, 106 U. S., 196.

"A State, without its consent, cannot be sued by an individual; and a Court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter."

Allen v. *Balt. & Ohio R. R. Co.*, 114 U. S., 315.

And in the dissenting opinion in the *Virginia Coupon Cases*, Justice BRADLEY, speaking for the Chief Justice and Justices MILLER and GRAY as well as himself, says: "The Eleventh Amendment, it is true, does not prohibit the extension of the judicial power of the United

States to suits prosecuted against a State by its own citizens. But the evident reason of this is, that the judicial power was not granted to the United States by the original Constitution in such cases; hence, as it was not granted it was not deemed necessary to prohibit it. It was evidently supposed that the control of all litigation against a State by its own citizens was in its own power, amongst that class of rights which was reserved to the States and the people. It would be very strange to say that, although a State cannot, in any case, be sued by a citizen of another State since the adoption of the Eleventh Amendment, yet, in a case arising under the Constitution and laws of the United States, it may be sued by its own citizens. This would be to deprive the State, with regard to its own citizens, of its sovereign right of exemption from suit.

"It seems to us, that the absurdity of the proposition is its sufficient answer. Unless the State chooses to allow itself to be sued, it cannot be sued; it has this prerogative, if no other. It is admitted, in point of form, that it cannot be sued by citizens of other States, or of foreign States, because of the Eleventh Amendment. The whole argument of the opinions of the majority of the Court is directed to the object of showing that the State is not sued in the suits under consideration. We do not remember that it is anywhere contended that the State can be sued by its own citizens, against its own law, merely because the Eleventh Amendment does not in terms extend to that case."

Va. Coupon Cases, 114 U. S., pp. 337, 338.

There is nothing inconsistent with this doctrine, as expressed by the minority of the Court, in the opinions of the Court in those cases—the point of the difference being that the cases, though maintained against State officers, under the peculiar circumstances, were not considered by the Court suits against the State, while the minority contended that they were, in effect, suits against the State.

5. It is manifest that the first Congress of the United States, at its first session, in defining the jurisdiction of the several Courts of the new Government, in the Judiciary Act, approved September 24th, 1789, intended to apportion among the Courts jurisdiction of every case and matter contemplated in the Constitution. Sec. 11 gives to the Circuit Court jurisdiction of no case in which a State is a party, and Sec. 13 gives to the Supreme Court *exclusive* jurisdiction "of all controversies of a civil nature where a State is a party, except between a State and its citizens," the Constitution making such jurisdiction *original* only.

So that we may not only take it to have been the interpretation of that Congress that no citizen could under the Constitution bring his State into any of the National tribunals, but also that Congress was impressed with the idea that the dignity of a *State* of the Union should never be lowered by permitting any State, country or individual to litigate with it in any of the National tribunals except the Supreme Court.

We deny that this interpretation has been changed, or this idea modified, by legislation, since.

The Act of March 3d, 1875, does not in terms allude to a suit by a citizen against his State, and by no fair construction can it be said that by conferring upon the Circuit Court original jurisdiction of all suits of a civil nature, at common law or in equity, &c., "arising under the Constitution and laws of the United States," it was intended to give that Court jurisdiction of a State as a party, which it did not have before; for in the clause in respect to parties, jurisdiction is given of "a controversy between citizens of a State and *foreign States*, citizens or subjects." *Expressio unius exclusio alterius—foreign States* being expressed, *States* of *the Union* are excluded. Besides, the word *suits* is not applicable to a State as a party defendant. A *suit* is properly defined to be, "an action or process for the recovery of a right or claim, in some Court." *Suits*, as here used, means the same as *cases*,

as used in the Constitution, where it is said, "the judicial power shall extend to all cases in law and equity," &c., and no such cases were known before the Constitution, or in the Constitution, except controversies "between a State and citizens of another State," and "between a State and foreign States, citizens or subjects."

Again, the act gives this jurisdiction as to suits, "concurrent with the Courts of the several States," and as the Courts of the States have no jurisdiction of *suits* against a State, the Circuit Court of the United States can have no *concurrent jurisdiction* of such suits.

But still again, and what seems to us conclusive of the whole matter, the Act of 1875 repeals only "all acts and parts of acts in conflict with the provisions of this act," and as section 13 of the Act of 1789, conferring *exclusive* jurisdiction upon the Supreme Court of all controversies in which a State is a party, &c., is not in conflict with the words or the spirit of that act—*it is not repealed;* and if any Court could have jurisdiction of a suit by a citizen against his State it would be this Court, and by the exception as above, it is excluded from such jurisdiction.

6. The cases above cited, and others like them, determine that the Constitution of the United States does not now warrant a suit against a State by a citizen in any court; and we are not to presume that Congress intended, by the Act of 1875, to confer jurisdiction not given by the Constitution; if it did, of course the act, *pro tanto*, would be void.

The cases begun and brought to this Court by writ of error and appeal since the passage of that act give no color to, but plainly negative, the position taken by the bondholder of the State in this cause. We give extracts from the latest of these cases, which seem to us to be decisive of this and to exclude the jurisdiction here contended for.

The case of *Hagood* v. *Southern*, 117 U. S., 52, brought to this Court by appeal from the Circuit Court of the District

of South Carolina, is, in most material respects, very similar to ours—the principal difference being, that there the party defendants to the plaintiff's bill were the Comptroller General and other officers of the State, without the State nominally as defendant, while here the Auditor, the corresponding officer, is sued as such, and the State is made defendant with him. There, as here, the suit was brought in a Court of the United States to enforce performance of a contract made by the State, and the controversy was as to the validity of the contract, and the only remedy sought was the performance of the contract by the State; and it was held that the State was the real party against whom relief was sought, and the suit was substantially within the prohibition of the Eleventh Amendment. The report of the case does not show whether the plaintiffs below were citizens of South Carolina, but it appears that they were assignees in bankruptcy of a corporation of that State.

The Court says: "It thus appears that a distinct issue is made by the State of South Carolina with the holders of this revenue bond scrip, and the controversy between them and the States involves the very question of the existence and obligation of the alleged contract. This controversy the State has undertaken to settle for itself. By its legislative department it has repealed the statutes authorizing its officers to execute the contract on its behalf, and forbidden the levy, collection and appropriation of taxes for the payment of the scrip. * * * These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. * * * Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done

and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is therefore substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States," &c.

117 U. S., pp. 66 and 67.

In the case of *Ex parte Ayers, Scott & McCabe*, at this term, the argument of the Court to show that officers of a State cannot be compelled by the orders of a Federal Court to do certain things which, when done, would constitute a specific performance of its contract by the State, or forbidden to do what, if done, would be merely breaches of a contract by the State, takes for granted that the State itself cannot be sued anywhere under the Constitution; and after pointing out the distinction under the Eleventh Amendment of the Constitution "between contracts of a State with individuals and contracts between individual parties," and showing that under Art. 1, sec. 13, contracts between individuals cannot be impaired by a State, it proceeds: "It is different with contracts between individuals and a State. In respect to these, by virtue of the Eleventh Amendment of the Constitution, there being no remedy by a suit against a State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract, in a constitutional sense. *Beers* v. *Arkansas*, 20 How., 527; *Railroad Co.* v. *Tennessee*, 101 U. S., 337. The very object and purpose of the Eleventh Amendment was to prevent the indignity of subjecting a State to the coercive process of judicial tribunals, at the instance of private parties. It was thought to be neither becoming nor convenient that

the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent and in favor of individual interests."

Can any reason be given why the Constitution should give the power to a citizen of a State to subject her to the indignity of a suit in the Federal Courts within her borders, and deny it to citizens of other States, while she denies to him the right to sue her in her own Courts, but permits him to ask redress for any wrong he may think he has suffered, or any right withheld, of her Legislature, which has control of her moneys and directs their disbursement?

The case last quoted says of the construction of the Eleventh Amendment, what we suppose to be the proper rule of construction of all provisions of the Constitution of a Republican Government: "To secure the manifest purpose of the constitutional exemption guaranteed by the Eleventh Amendment, it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

What was that purpose? To prevent the sovereign States of the New Union from being coerced by legal process to perform their contracts and pay their debts, at a time when their treasuries were nearly bankrupt and it was difficult for them to meet current expenses. Before the days of railroads and canals, by which interstate commerce was in the future to spring up and be made important, with whom were the contracts of the original thirteen States made and who held their evidences of debt? *Mostly*, of course, their own citizens. And these evidences of debt being commercial paper, if a citizen could anywhere sue his State, what was to prevent non-resident holders of such paper from transferring them

to a citizen of the State, or moving into the State for the purpose of collecting his claim against it?

The Constitution of North Carolina, like those of the other original thirteen States, at the time of the adoption of the National Constitution, contained no provision for suits against the State. From 1776, when it was adopted, until 1868, when a new Constitution was adopted, under the reconstruction laws of Congress, there continued to be no such provision, and all claimants against the State were compelled to resort to the Legislature for redress in the first instance. A clause was inserted in the Constitution of 1868, giving the highest Court jurisdiction "to hear claims against the State," with this qualification: "but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

Const. of N. C., Art. 4, Sec. 9.

This is, in no sense, the "one form of action for the enforcement or protection of private rights or redress of private wrongs," which under the denomination of "a civil action" in that Constitution (Art. 4, Sec. 1,) has taken the place of "actions at law and suits in equity."

See *Railroad Co.* v. *Tenn.*, 101 U. S., 337; and *Railroad Co.* v *Alabama, Ibid.*, 832.

In cannot be presumed that North Carolina, when she ratified the Constitution of the United States, in November, 1789, supposed that by the doubtful phraseology of Art. 3, Sec. 2, of that instrument she was surrendering to the Federal Courts, to be held within her own borders, her right of exemption from suits, by her own citizens, who held her bills of credit in quantities sufficient to make her empty treasury bankrupt for years.

The absence of such a case as this from the records of this Court, and of legislation to warrant such an one, for nearly a century after the adoption of the Constitution, the alarm displayed in the States when it was decided, in *Chisholm* v. *Georgia*, that a State might be made a defendant at the suit

of a foreigner or a citizen of another State (as evidenced by the resolutions of the Legislatures of Massachusetts and other States), the proposal of the Eleventh Amendment to the Legislatures of the several States in September, 1794, and its adoption as soon thereafter as the necessary action could be taken, it seems to us, should satisfy all that no such jurisdiction exists or was ever contemplated. The case of *Cohens* v. *Virginia*, in 6 Wheaton which has been quoted, since it was decided in 1821, by all who favor the extension of the jurisdiction of the Federal Courts to its utmost limits, in effect admitted that those Courts cannot be resorted to for the establishment of a demand by a citizen upon a State, and we search the Reports in vain for a single case in which this Court, or a Justice of this Court, has held that any Federal tribunal can take jurisdiction of a suit by a citizen against his State.

It appearing from the certificate of division in opinion between the Judges below "that the case made in the record against Roberts as Auditor, &c., was *merely incidental* to that against the State of North Carolina," we suppose it will not be contended that, if the suit cannot be maintained on the alleged contract, to compel the State to perform it, jurisdiction exists to compel this officer to do what the State forbids him to do. But such contention, if made, is completely met by the cases of *Hagood* v. *Southern* and *Ex parte Ayers*, above cited.

R. H. BATTLE.
(of Battle & Mordecai,)
Of Counsel for Appellants.

BRIEF FOR APPELLANTS.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 1034.

THE STATE OF NORTH CAROLINA AND WILLIAM P. ROBERTS, AUDITOR OF THE STATE OF NORTH CAROLINA, APPELLANTS,

vs.

ALFRED H. TEMPLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

T. F. DAVIDSON,
Attorney General of North Carolina,
THOMAS RUFFIN and
JOHN W. GRAHAM,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

THE STATE OF NORTH CAROLINA AND WM. P. ROBERTS, AUDITOR OF THE STATE OF NORTH CAROLINA, APPELLANTS,

against

ALFRED H. TEMPLE.

BRIEF FOR APPELLANTS.

No statement of the facts involved in this appeal seems to be necessary, further than to say that it was intended to present, and does present, but a single question of jurisdiction, to-wit: whether a citizen of the State of North Carolina can maintain his action in the Circuit Court of the United States for the Eastern District of said State, against the State and its Auditor, seeking to have an amendment of the State Constitution, adopted on the 3d day of November, 1880, and certain acts of its General Assembly, forbidding the levying and collection of a certain tax known as a "special tax," declared to be unconstitutional and void; and the said tax of one-eighth of one per cent., levied as directed in the act ratified January 29th, 1869, under which the bonds held by the defendant in error were issued.

In determining this question of jurisdiction, the burden justly rests, as we submit, upon the plaintiff below. He brings his action against his non-consenting sovereign State, to enforce the specific performance of what he alleges is the State's contract, for which neither the judicial records of this country nor those of the English courts furnish a precedent.

Each day's experience points to instances of contracts between States and their citizens—contracts, too, unfulfilled, and out of which, actions, if any such were given by law, must have grown.

In the absence of all precedents, may we not say as LITTLETON said, when discussing the question whether a certain action was given by *Magna Charta*, "that if any action might have been brought for such matter, it shall be intended that at some time it would have been brought;" or as Lord COKE said, "as usage is a good interpreter of laws, so non-usage, when there is no example, is a great intendment that the law will not bear it."

The English authorities need not be commented on at much length. They were all carefully collated and critically examined in this Court by Justice IREDELL, in *Chisholm* v. *Georgia*, 2 Dall., 419, and more recently by Justices MILLER and GRAY in *United States* v. *Lee*, 106 U. S., 196, in which latter case it is declared to be beyond question that from the time of Edward the First till now, the King of England was not suable in the courts of that country, except where his consent had been given on petition of right. In the celebrated *Banker's* case, reported in 5 Modern Reports, 29, Lord Keeper SOMERS declared that by all the authorities, both ancient and modern, it was plain that if the subject was to recover a rent, annuity, or other charge from the Crown, "in all cases the remedy to come at it was by petition to the person of the King; and that no other method could be shown to have been practiced at common law;" and that this opinion of his has ultimately prevailed in England, notwithstanding he was overruled in that particular case, is to be seen by reference to the later cases of *Smith* v. *Ritton*, 6 Manning & Grainger, 251; *Thomas* v. *Irwin*, Law Report, 10; Queen Bench, 31; *Railway* v. *Irwin*, 11 Appeal Cases, 607.

Such being the common law, it remains the law of this country, unless changed by some constitutional ordinance or

legislative enactment. As said by Justice IREDELL, in *Chisholm* v. *Georgia*, *supra*, "the common law" is presumed to be the ground-work of the laws of every State in this Union, and, unless controlled by some special legislation, is in force in each State, as it existed in England at the first settlement of the country.

Confessedly, there is no provision of the Constitution of the State of North Carolina, or statutory legislation, that modifies this rule of the common law which forbids a suit against a sovereign at the instance of one of his subjects. *Horne* v. *The State of North Carolina*, 84 N. C., 362.

This rule of the common law has frequently been adverted to and commented upon in this Court, and much ingenuity exercised to ascertain the reason of the rule; notably was this the case in *United States* v. *Lee*, 106 U. S., 196, where Justice MILLER comments upon the rule and the several reasons that have been assigned for it, and says, quoting from the opinion of Justice Gray in *Briggs* v. *Lightboats*, 11 Allen (Mass.), 157: "The broader reason for it, is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits, as a matter of right, at the will of any citizen." But whatever the reason of the rule might be, he declares that the exemption of the United States, and of the several States, from being subjected as defendants to ordinary actions in the Courts, has always been treated as an established doctrine of this Court

And so, in the same case, Justice GRAY, after passing in review all the decisions of the English Courts, beginning at the time of *Magna Charta*, and coming to the latest, declares that those "authorities, from the earliest to the latest times, show that no action can be maintained to recover the title or possession of land held by the Crown or its officers or servants;" and he quotes, with the fullest approval, what was said by the late Chief Justice TANEY in *Beers* v. *The State of Arkansas*, 20 How., 527, where he declared it to be

an "established principle of jurisprudence, in all civilized nations, that the sovereign cannot be sued in its own Courts, or in any other, without its consent and permission." And also what was said by Justice DAVIS, in *Nichols* v. *United States*, 7 Wall., 122, when delivering the judgment of the Court, he declared that "every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute;" which principle, he says, applies to every sovereign power, and but for the protection which it affords, the government might be unable to perform the duties for which it was created.

If such was the rule in England, at a time when the sovereign had his own fixed and independent revenues, out of which he was expected to defray not only his private expenses but those for the ordinary support of his government, and when he was clothed with high prerogatives, and in himself embodied all the sovereignty of his kingdom, so that he alone could contract and pay debts, with how much greater force does it apply to the Executive of a State, whose authority is limited by the legislative will, so that, without its sanction, he cannot touch a dollar of the State's money or dispose of an article of its property, and who would therefore be powerless to perform any judgment that might be rendered against him, or against the State through him.

Is it not too plain that a party contracting with a State, under a system such as ours, does so relying upon the public faith alone, knowing that the legislative body, in case of a breach of the contract, is the only power that can be appealed to for a remedy?

In North Carolina it has been held by her Supreme Court that, under the law of that State, there is but one power that can appropriate the public money, for any purpose, and that one is the General Assembly of the State, and that any officer who, having the State's money or other property in his charge, applies it to any purpose, without the sanction of

that branch of the State government, is guilty of a clear breach of duty. *State* v. *Bevers*, 86 N. C., 588.

In such cases, as said by Justice IREDELL in Chisholm's case, "the remedy consists in an appeal to the discretion of the Legislature, and cannot be the result of any compulsory process by the Court;" or, as said by Justice MILLER, in *Cunningham* v. *Railroad Co.*, 109 U. S., 446, "where any breach of public faith on the part of a State is complained of, the only power to give relief is its Legislature;" and as it would be absurd to undertake to sue a Legislature, he declares that very difficulty "shows the impossibility of compelling a State to pay its debts by judicial process." And so also in *Bank of Washington* v. *The State of Arkansas*, 20 How., 530, Chief Justice TANEY, speaking for the Court, declared that "those who deal in the bonds and obligations of a sovereign State, are aware that they must rely altogether on the sense of justice and good faith of the State, and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State."

It is true, the party suing in this case insists that he once had a declaration of legislative will sufficient to furnish him relief; but that provision of the law has been expressly repealed, and, by an amendment to the Constitution of the State, it is made unlawful for the Legislature to re-enact it, without first having the sanction of the people of the State. And, by law, the Auditor of the State is expressly prohibited from giving out forms for the collection of the tax. which the plaintiff in his bill seeks to have collected; and in case of his non-observance of this prohibition, the State Auditor is subject to indictment: and we submit that since the cases of *Louisiana* v. *Jumel*, 107 U. S., 711, and *Hagood* v. *Southern*, 117 U. S., 52, this Court will never entertain jurisdiction of an action, the purpose of which is to constrain a State officer to disobey the positive orders of the supreme political power of his State.

And, however difficult it may be to reconcile the various

decisions of this Court touching the suability of States, we take it that there can be no longer any doubt resting upon that point since the declaration of Justice MILLER in *Cunningham* v. *Railroad Co., supra*, when speaking for the Court he said "that it should be accepted as a point unquestioned that neither a State, nor the United States, can be sued as defendant *in any Court in this country without their consent*, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States, by virtue of the original jurisdiction conferred on that Court by the Constitution."

Finding the common law to be as heretofore stated, it remains to enquire, whether any change in this particular has been worked by the Constitution of the United States, Art. III, Sec. 2; and to this it seems to be sufficient to say that the Judiciary Act of 1789, which was intended to give effect to that article of the Constitution, and is therefore a legislative interpretation of its purview and meaning, in terms restricts the jurisdiction of the Supreme Court, and excludes therefrom a controversy between a State and its citizens (section 13 of said act); and by section 11 of said act only such jurisdicton is conferred upon the Circuit Courts of the United States, in suits of a civil nature, at common law or equity, as is concurrent with the Courts of the several States; and as we have before seen that no State Court has jurisdiction of a controversy between a State and its citizens, it follows from the very terms of the law itself, intended to be co-extensive with the provisions of the constitution, that in such case no jurisdiction attaches to the Circuit Courts; and accordingly we find that in no single case have such Courts entertained, or attempted to take cognizance of, a suit against a State, at the instance of its citizen.

But whatever may have been the provisions of the Constitution, as originally adopted, it must, as we think, be conceded that all doubt upon this point was removed by the XI Amendment of the Constitution, when we take into consider-

ation the circumstances under which that amendment was adopted, and the evil it was intended to remedy.

This amendment was the direct result of the excitement growing out of the decision in *Chisholm* v. *Georgia*, 2 Dallas, 419, affirming the right of a non-resident citizen to maintain an action against the State. (See Schouler's History of the United States, Vol. 1, p. 274.) The object of this amendment is not to introduce a new principle into the Constitution, but simply to give to it its proper construction. Its language is that "the judicial power of the United States shall not be *construed* to extend to any suit in law and equity," &c.; that is to say, that the Constitution shall not be read and expounded so as to confer jurisdiction against a State in action by cit zens of another State; and the purpose was to meet the demands and expectations of the people of the several States, calling for a correction of the judicial interpretation in this particular.

It is plain that the dissenting opinion of Justice IREDELL, in that case, met public expectation and demand, and that the object of the amendment was to fix his opinion, as to the construction of the constitution, as its true construction.

It was adopted in pursuance of suggestions of nearly all, if not all, of the States then constituting this Union, the purport of which suggestions may be seen by reference to the resolutions of the Massachusetts Legislature, wherein they instructed their members of the Federal Congress to adopt the most speedy and effectual measures in their power to obtain such amendment in the Constitution of the United States, 'as will remove any article or clause of said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer *in any suit* by an individual or individuals in any Courts of the United States;" the object of the amendment being to answer these demands of the State of Massachusetts and the demands of other States, couched in terms of similar import.

It was intended to remove from the Constitution every

provision that could by possibility be so construed as to give countenance to or uphold a suit against the State at the instance of any individual or individuals, being citizens of another State or of a foreign State; and the reason that no express protection was given to the States against suits by their own citizens, was, as declared by Justice BRADLEY in *Marye* v. *Parsons*, 114 U. S., p. 325, because no jurisdiction in such cases had ever been granted under the Constitution, to the Courts of the United States, or any of them, and it was not therefore deemed necessary to prohibit it. As further said by the same learned Justice, it was plainly supposed that the control of all litigation against a State by its own citizens was in its own power, and that to hold otherwise would result in the strange anomaly of leaving a State, that could not in any case be sued by citizens of another State, liable to be sued by its own citizen, thereby depriving it of its right of sovereignty over its own subjects, as to whom alone it was sovereign—the absurdity of which proposition was declared to be the best answer to the suggestion that such a suit could be maintained.

But we are not left to mere inference upon this point, since it has been judicially determined, in the recent case of *Ex Parte Ayres*, decided at this term, that the very object and purpose of that amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, whether citizens of other States or aliens; and where the difference, we ask, between such parties and citizens of the State itself, except that in the latter case the indignity would be the greater, and the inconvenience the more intolerable. We are further told that the exemption guaranteed to the States should not be interpreted literally and too narrowly, but with such breadth and largeness as effectually to accomplish the purpose of its adoption. And it is impossible, as it occurs to us, to have an authority more directly in point and decisive of the very question now under discussion, than that furnished by the decision of this

Court, in *Railroad Co.* v. *Alabama*, 101 U. S., 832, in which it was held that the repeal of a State statute, in force at the time the contract was made, and conferring the right of suit against the State upon such contract, deprived the Court of jurisdiction, and that such repeal was not in violation of the contract-clause of the Constitution of the United States; and to the same effect is the decision in *Railroad Co.* v. *Tennessee*, *Ibid*, 387.

Why, may we not ask, did the Court feel constrained to bestow so much labor in these two cases, upon the question as to what effect the repealing act should have upon rights of the parties, if, independently of the original act, which was repealed, and in spite of its repeal, a right of action had been given the plaintiff by force of the Constitution of the United States, or the Judiciary laws of the United States then in force.

The same reasoning applies to the amended Judiciary Acts of 1875 and of 1887. In both, the jurisdiction conferred upon the Circuit Courts of the United States, is simply that of which the Courts of the several States have concurrent jurisdiction, so that the jurisdiction of the State Courts becomes the standard by which to measure the jurisdiction of the Federal Courts, and when it fails, as we see it does, when the State is a party, the other ceases.

There is nothing in conflict with these views in what is said in *Cohens* v. *Virginia*, 6 Wheaton, 264, in which case it must be admitted that the question of jurisdiction, in a case where a State was a party, was pressed to the very verge of the law, for in that case Chief Justice MARSHALL, after listening to the arguments of counsel, both for and against the State, by whom it was claimed, and admitted, that the Federal Courts never had jurisdiction of a suit between an individual and the State whereof he was a citizen, declares the law so to be—his language being that "the Federal Courts never had jurisdiction over contracts between a State and its citizens." And again, he says "the Courts have no jurisdiction

over such a contract; they cannot enforce it, nor judge of its violation, even though satisfied that the act of the State in discharging the debt was a mere nullity, and that the debt still existed as such."

To resume: This is an action against the State by name, in which its creditor is seeking affirmative relief, to compel specifically the performance of its contract by process of law, and to compel officers of the State to do certain acts which, in themselves, amount to a performance of its contract by the State. It falls, therefore, clearly under the ban, as laid down in *Antoni* v. *Greenhow*, 107 U. S., 769, as distinguished from *Poindexter* v. *Greenhow*, 114 U. S., 272, in the very lucid opinion of Justice MATTHEWS, rendered in the latter case.

As to the cause of action against the State Auditor, we submit that, after the decisions in *Louisiana* v. *Jumel* and *Hagood* v. *Southern*, before cited, it cannot be entertained, it being in direct conflict therewith.

As to the State's motion to dismiss, upon the ground of want of jurisdiction in the Court, it is only necessary to refer to the decision of *The State of Rhode Island* v. *The State of Massachusetts*, 12 Peters, 657, in which it was held that such a motion to dismiss was a proper mode of procedure, and that thereby, though made after replication, the question of jurisdiction was properly raised, which must be decided by the Court before it could take one further step in the cause

T. F. DAVIDSON,
Attorney General of North Carolina,
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JOHN W. GRAHAM,
Of Counsel for Appellants.

FILED,
FEB 17 1890
JAMES H. MCKENNEY,

BRIEF FOR APPELLANTS

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 392.

THE STATE OF NORTH CAROLINA AND WILLIAM P. ROBERTS, AUDITOR OF THE STATE OF NORTH CAROLINA, APPELLANTS,

vs.

ALFRED H. TEMPLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

T. F. DAVIDSON,
Attorney General of North Carolina.
R. H. BATTLE and
JOHN W. GRAHAM,
Counsel for Appellants.

Supreme Court of the United States,

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No. 392.

THE STATE OF NORTH CAROLINA AND W. P. ROBERTS, AUDITOR OF THE STATE OF NORTH CAROLINA, APPELLANTS,

vs.

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ADDITIONAL BRIEF FOR APPELLANTS.

In answer to the argument submitted, that the State of North Carolina, by its adoption of the Constitution of the United States in 1789, agreed that suit might be brought, to prevent any violation of that Constitution, by any party aggrieved, we take copious extracts from the printed argument of Hon. John A. Campbell, in New Hampshire vs. Louisiana, 108 U. S., 76, both on account of its great ability and for the further reason that copies of that argument cannot now be furnished to the members of this Court.

The judicial power of the United States does not extend to any suit commenced or prosecuted against one of the United States by any individual, whether a citizen of the United States or of a foreign State.

This immunity is an incident to sovereignty, and has existed since the Declaration of Independence, during the Confederation, and is formally declared in the Constitution of the United States.

That, at the date of the Declaration of Independence, thirteen colonies of Great Britain were and had been united under the name of the United Colonies of America, and, by that declaration, became free and independent States, and might do and enjoy all that such States might do or receive.

The States of this American Union, in respect to all of those powers that were not delegated to the United States to be exercised by the government of the United States, or which they were not inhibited to employ, are supreme and sovereign, as if no Constitution had been made. That the State administration within this range may be carried on as independently as if the government of the United States did not exist. That the power of taxation, with the auxiliary and consequential powers of assessment, collection, preservation and appropriation of the moneys arising from taxation, extends to all the property within the State which exists by its authority or was introduced by her permission. That there does not exist under the Constitution of the United States a power to retard, impede, burden or control one State at the suit of another in any one of these acts of municipal sovereignty upon any pretense whatever. These are reserved rights, beyond the power of the United States as constituted.

That it is inherent in the nature of sovereignty not to be amenable to suit without its consent.

This attribute of sovereignty the States have habitually enjoyed since the Declaration of Independence, without diminution. It is only by their consent that controversies between two or more States are subject to the determination of this Court.

That the United States owe their origin, union, stability and progress mainly to the equal political communities which preceded their formation, and to the co-existence of those communities during their entire duration and development. That these communities and the United States are co-ordinate, having distinct, and for the most part, independent functions to perform in the work of government.

That the States, in all matters of internal government that have not been surrendered by their ratification of the Constitution, are sovereign and supreme, as if there were no United States, and the powers thus reserved are recognized in, and have become a part of, the Constitution. That there has not been delegated to the United States any power which would authorize them to declare that the State is a debtor to a State, or an individual, for a sum of money, and to use any power or authority of the government to enforce the payment by any mandate to the State, or to its government, or by exercising any of the powers of the State for that purpose.

The plaintiff below complains that the defendant owes a sum of money as interest due on certain of her bonds which the plaintiff has acquired long after their issue by assignment, and demands a decree to establish this debt and to enforce a claim upon a security given for its payment, and claims that this suit in this Court is warranted by the Constitution.

After the organization of the government under the Constitution, the Supreme Court rendered an interlocutory order in a case of Chisholm vs. The State of Georgia, after a discussion by the attorney for the plaintiff to the effect that the State would be liable to a judgment by default, in case of her non-appearance in the Court. William Vassal, an alien in 1793, then sued Massachusetts, and these two suits caused measures to be taken in Congress and among the States for the adoption of the 11th Amendment to the Constitution, which directs that "the judicial power of the United States shall not be construed to extend to any suit in law or equity against one of the United States by a citizen of another State or a citizen or subject of a foreign State."

Some confusion in professional and judicial discussion has been occasioned by the proceedings in respect to that amendment, which makes it suitable for us to ascertain their import.

After the submission of the Constitution to the States for adoption, there were apprehensions or suggestions expressed, which are noticed in the 81st number of the *Federalist*, prepared by Hamilton. "I take occasion to mention," he says, "a *supposition* which has excited alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another State would enable them to prosecute that State in the Federal Court for the amount of those securities, a suggestion which the following considerations prove to be without foundation. It is in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind.

"And the exemption as one of the attributes of sovereignty is now enjoyed by the government of every State of the Union.

"Unless, therefore, there is a surrender of the immunity in the plan of the convention, it will remain with the States, and the danger intimated will be ideal. The circumstances which are necessary were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles then established will satisfy us that there is no color to pretend that the State governments would, by the adoption of the plan, be divested of the privilege of paying their debts in their own way, free from any constraint but that which flows from the obligations of good faith. The contracts between a Nation and individuals are only binding on the conscience of the sovereign, and have no pretence to a compulsive force. They convey no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State. And to ascribe to the Federal Courts, by mere implication and in destruction of a pre-existing right of State government, a power which would involve such conse-

quence would be altogether forced and unwarrantable."—*Federalist*, No. 81.

The supposed case which Hamilton has disposed of by a refutation so cogent and convincing does not materially differ from that before this Court.

Is it probable the States would have consented to grant a power fraught with such consequences to individuals or States?

George Mason and Patrick Henry afterward made use of this suppositious case with power in the Virginia convention. Referring to the clause, "to controversies between a State and citizens of another State," Mason asked, "How will jurisdiction in this case do? Let gentlemen look to the westward. Claims respecting those lands, every liquidated account, or other claim against this State, will be tried before a Federal Court. Is this not disgraceful? Is this State to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the State to be arraigned like a culprit or private offender? I think this is perfectly unnecessary."

3 Ell. Deb., 480 (1st edition).

Patrick Henry reinforced Mason with his vehement invective and eloquence, and concluded a reply to Madison by the remark, "It would ease my (his) mind if the honorable gentleman would tell me the manner in which money should be paid, if, in a suit between a State and individuals, the State were cast.

"The honorable gentleman, perhaps, does not mean to use coercion, but some gentle caution. I shall give my voice for the Federal cognizance, only where it will be for the public liberty and safety."

3 Ell. Deb., 493 (1st edition).

Madison replied: "The Federal jurisdiction, in controversies between a State and citizens of another State, had been much objected to, and, perhaps, without reason. It is not in

the power of individuals to call any State into Court. The only operation the clause can have is that, if a State should wish to bring suit against a citizen, it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State Courts. * * * It appears to me that this clause can have no operation but to give a citizen a right to be heard in a Federal Court, and if a State should condescend to be a party, this Court may take cognizance of it."

3 Ell. Deb., 485–6.

Marshall replied to the objections. He said: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of a Federal Court. It is not rational to suppose that the sovereign power shall be dragged before a Federal Court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. I see a difficulty in making a State defendant, which does not prevent its being plaintiff."

3 Ell. Deb., 504–5.
17 How., 518.

In several of the conventions there was but little discussion on this clause. North Carolina declined to ratify the act of the Federal Convention without amendments, and submitted them. She excluded some of the powers I have quoted from the Constitution by her proposed amendment. So other States proposed explanatory and restricting amendments. The contemporary exposition, which is esteemed as so strong and trustworthy in the determination of the true intention of the authors of a law or constitution, leaves little room for doubt on the subject. The general opinion was, a

State could not be sued without her consent. This opinion was inculcated by the most prominent supporters of the Constitution.

The only disturbance made on this subject originated in the interlocutory order of this Court in Chisholm vs. Georgia, reported, 2 Dall., 419, and the proceedings of the Court at the time it was entered. The order was that the State should plead to the writ of the plaintiff, or a default might be taken, for that the Court had jurisdiction. Four of the Judges of the Court sustained the constitutional jurisdiction of the Court. It appears that Georgia declined to do more than to protest against the jurisdiction, and instructed her counsel not to argue the cause. Virginia, about the same time, by the *unanimous* vote of her Legislature, declared her opposition.

Florida vs. Georgia, 17 How., 417, 518, 519, 520.

In June, 1793, Vassal, a British subject, commenced a suit against Massachusetts, and process was served upon her Governor, John Hancock. The Governor convened a special session of the general Court, by proclamation, to meet in the month of September, 1793. In his speech to them, he said: "I cannot conceive that the people of this Commonwealth, when, by their representatives in convention, they adopted the Federal compact, expected a State should be held liable to answer, on compulsory civil process, to an individual of another State or a foreign kingdom." Four Judges of the United States have given it as their opinion that the several States are thus liable. The question becomes highly important to the people.

After tracing the consequences he apprehended might follow from such a procedure, he suggested the propriety of proposing an additional article to the Federal Constitution, in which the sovereignty of a State should be so far secured as not to be liable to a civil suit in the Courts of the United

States at the instance of an individual, whether a citizen of the United States or of a foreign country.

He considered this the most proper course, and most for the peace and harmony of the Union. At the same time, he expressed an opinion in favor of the sovereignty of the States in cases not expressly or plainly prohibited by the Federal Constitution. In the same speech, he said: "The great object presented to us by our political situation is the support of the general government, and affording force and efficacy to its functions, without destroying its powers which the people have vested in and reserved to the State governments. A consolidation of all the States into one government would at once endanger the nation as a republic, and eventually divide the States now united, or eradicate the principles for which we have contended. It is much less hazardous to prevent the establishment of a dangerous or erroneous precedent than to attempt to contravene it after it has obtained a place in a civil constitution."

This weighty and forcible exposure and warning was the legacy of a dying patriot to his countrymen.

The Governor died the following month, and the task of completing his work devolved on Samuel Adams, Lieutenant Governor. The Legislature resolved "that a power claimed, or which may be claimed, of compelling a State to become a defendant in a Court of the United States, at the suit of an individual or individuals, is, in the opinion of this Legislature, unnecessary and inexpedient, and, in the exercise, dangerous to the peace, safety and independence of the several States, and repugnant to the first principles of a Federal government." An additional resolution was passed instructing and requesting the Senators and Representatives in Congress to exert themselves to obtain an amendment to the Constitution to prevent a State from being amenable to a civil suit in the Courts of the United States.

Caleb Strong, a Senator from Massachusetts, who had been in the Convention which framed and ratified the Fed-

eral Constitution, and, as Senator and member of the judiciary committee, had assisted to prepare the judiciary acts then in force, in January, 1794, introduced the resolution for adding the 11th amendment to the Constitution. His resolution was not altered until the amendment was incorporated into the Constitution, and afforded the answer to the suit of Vassal. Mr. Gallatin was then temporarily in the Senate, under an election which was pronounced void a few weeks after. He offered as a substitute: "That the judicial power of the United States, *except in cases arising under treaties* made under the authority of the United States, shall not be construed," &c. So another substitute was offered:

"The judicial power shall extend to all cases of law and equity in which one of the United States is a party, but no suit shall be prosecuted against any one of the United States by citizens of another State, or by citizens of a foreign State, which shall have arisen before the ratification of this amendment." This substitute asserted the propriety of subjecting a State to the judicial power of the United States at the instance of private persons, but deferred it until after the States had full notice of the rule. Neither of these substitutes were adopted by the Senate. They received but two votes. The resolution as offered by Senator Strong was passed 23 to 2. Ellsworth, Rufus King, George Cabot, Caleb Strong, James Monroe and John Taylor sustained it. In the House of Representatives, an addition to the resolution of the Senate was proposed, so that it would be operative only "where such States have previously made provisions in their own Courts, whereby such suit may be prosecuted to effect." This amendment received eight votes and was rejected. The resolution of the Senate was passed 81 to 9. Among the supporters the familiar names of Fisher Ames, Samuel Dexter, James Madison, Nathaniel Macon, Abraham Baldwin, Uriah Tracy and Theodore Sedgewick appear.

Annals of Congress 1793—1795.

3 Congress, pp. 26, 30, 31, 226, 476—477.

The States ratified the amendment, and thus seemed to apply what Bossuet had said of the papal power to the government of the United States.

"The ocean has its appointed bounds, and were it to break through those limits its plentitude would become a cataclysm which would engulf a continent."

We have thus followed the history of the clauses; we have quoted from the second section of the third article of the Constitution, and have found a broad, full and uniform body of authority and opinion in favor of the conclusion that the States of the Union are not amenable to a suit in any case where their recorded consent cannot be found. That no individual has obtained that consent from the Constitution of the United States.

And that the only instance where there has been, or is a consent, is the consent yielded to a sister State. In the careful and prepared speeches of Madison and Marshall we have quoted, the opinion is expressed that suits between foreign States and States of the Union could not be maintained without the consent of both parties. There is a difficulty in imagining a cause for suit between parties, when one is disabled and incapacitated from treaty, alliance, confederation, compact or agreement with the other.

Duke of Brunswick vs. Hanover, 6 Beav., 1; 1 H. L., 657.
Vavasseur vs. Krupp, L. R. 9, Ch. D., 351.

Machiavel, instructing a prince how to become a sovereign, and to maintain his authority and power when acquired, admonishes him that no task is more difficult, none more dangerous, none in which success is more doubtful than the introduction among a people of new laws and institutions. Certainly this is true when the task proposed is so complex and intricate as that which Hancock described to the Legislature of Massachusetts: "The support of the general government, and affording force and efficiency to its functions without destroying the power which the people

have vested in and reserved to the State governments." The increase of the States in number and in population and prosperous development; the fluctuations in the political, moral and material conditions of the population, and the admixture of a variety of races under the same laws have aggravated the embarrassments of the Federal and the State governments. We have seen with what sensibility the States of the Union received the writs addressed to them from this Court to answer the demands of persons claiming to be creditors, and with what promptitude the mandate of the supreme power in the land, speaking through two-thirds of the Congress, and three-fourths of the State Legislatures, arrested the progress of the suit and caused its dismission from the records of the Court. As Gouverneur Morris wrote eighteen years after: "To bring a State in a Court of Justice has more of what the French called *le beau ideal*, than of rational policy." 3 Morris Life, p. 266. The considerations presented with so much force by Hamilton, and sustained with such fidelity and success by Madison and Marshall, in the infancy of the republic, are the guide-posts and landmarks to maintain with truth and loyalty.

The result of this inquiry is to establish that the States never parted with the exemption and immunity from suit, which Hamilton testifies every State was possessed of and enjoyed at the time the Constitution was framed; that there was no intent on their part to abdicate or relinquish that privilege of sovereignty; that when that privilege was invaded by a responsible authority there was a successful resistance to it. Had there been a grant of such a jurisdiction to this Court, it might have afforded some sanction to the argument that the States were municipalities, subject to the domination of National government, and that the government established was a government without limitation upon its powers. The eleventh amendment to the Constitution removes every foundation for such a conclusion.

In all of the proposals for connection, confederation or union among the colonies or States, which now form a part of the United States, there may be distinguished two prominent features. There was a ready assent to grant to the citizens of all of the colonies a community of right and privilege in each, which finds its expression in the second section of the fourth article of the Constitution, and the corresponding article of the Confederation. With this civic union there was always a reservation that the separate and distinct political community, which, by the Declaration of Independence, became a free State, should not become extinct; that the independent organization—the republican government—the municipal laws and the sovereign control of their internal policy and regulation, including their exemptions from suits from the United States, and from all individuals, without their consent, shall not be dismissed. The clause of the Constitution extending the judicial power to controversies between two or more States, is the sole concession made by the States on this subject. We have noticed that the colonies had their disputes and differences as to territory and boundary. That during the war, besides these, other causes or sources of controversy had arisen and had not been decided. An immunity from suits is inherent in the nature of sovereignty, and the faculty of maintaining or waiving the immunity belongs to the State, to be employed according to its will, or as the welfare of the State requires.

The general plan of the Constitution was to place under the dominion of the Federal government all subjects of Federal interest, and that the States, as to each other, were to be isolated, independent and alien.

Buckner vs. Finley, 2 P., 586.
Bank vs. Earle, 13 P., 519.

Instead of abolishing the States or destroying their jurisdictions and authorities, they ordained as a part of the

supreme law of the land that all the powers they had not deletaged to the United States, nor prohibited to the States, are reserved. It was of States thus organized and empowered, that Hamilton wrote: "It is inherent in the Nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and practice of mankind," also "that this immunity from suit is now enjoyed by the government of every State in the Union." He adds, "that contracts between a nation and individuals can have no compulsory force." Mr. Webster, with a larger experience of the administration of government, in the opinion given to Baring Brothers in 1839, reinforces the opinion by the conclusion "that the security for State loans is the plighted faith of the State. The same basis, for example, as loans made to the United States under the authority of Congress—the good faith of the government."

VIth Webster's Works, 537.

At the date of these opinions States had suffered, and were suffering discredit, because of defaults in payment of debts. In 1787, there was public and private destitution, public and private insolvency and disrepute. The supposed case which Hamilton paused to consider and to elucidate, was one calculated to alarm the public mind. There were creditors and debtors interested in this discussion, and there was plausibility in the argument for the creditor. If a State be allowed to sue, why should not she be sued is a natural inquiry? George Mason and Patrick Henry presented this case to the Virginia convention as one requiring attention, and as disclosing the appearance of peril to the commonwealth. Is the State to be arraigned as a delinquent at the bar of a Federal Court? they asked. Must we endure this humiliation? One of them spoke with that mirth which is heaviness, of the possible arrest of the State upon a *capias ad satisfaciendum*. The replies of Madison and Marshall are studied and elaborate. They followed in

the way of thinking of Hamilton. Marshall covers the whole argument in his statements. He says that Virginia had been in Court in many a case, but never as a defendant—there was a difference—and that the Constitution signified only that the Court was open to the State as a plaintiff.

We find the same language in the Courts of Great Britain. In a late case in Chancery, Justices said: "The municipal law of this country does not enable the judicial tribunals of the country to exercise any jurisdiction over foreign governments as such, nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction." The result is, that these so-called bonds amount to nothing more than debts of honor, binding so far as debts of honor can bind, but are not contracts enforcable before the ordinary tribunals of the country which issued them without the consent of the government of the country. Twycross vs. Dreyfus, L. R,, 5 Ch. D., 605. BLACKBURN, Justice, says of the same form of securities: "Foreign and colonial governments frequently create a public debt, the title to portions of which is made to depend on the possession of bonds expressed to be payable to the bearer or holders. There can hardly be said, properly, to be any right of action on such instruments at all, though the holder has a claim on the government."

Crouch vs. Cr. Fonc., L. R., 8, Q. B., 384.

So Hamilton, in his report in 1795, says: "Public debt can scarcely, in legal phrase, be defined either as property in possession or in action. It is evidently not the first till it is reduced to possession by payment. To be the second, would suppose a legal power to compel payment by suit. Does such a power exist? The true definition is, a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

Annals of Congress, 1793—95, 3 Cong., p. 1362.

Justice IREDELL, in the case of Chisholm decided in this Court, established by authority that before the colonization of any portion of the territory composing the United States, the immunity of the Sovereign from suit was an established principle of the common law.

The United States have always enjoyed this immunity as inherent.

93 U. S. R., 433—486.
9 L. Rep., Ch. D. 351.
6 Beaven, 1.

The judgments of this Court relieve the executive departments of the United States from the operation of all judicial scrutiny and control, unless the Act of Congress imposes a plain, specific and ministerial function, which leaves nothing to be done by the officer but simple and implicit obedience. "It would occur *a priori* to every mind, that a treasury not fenced around by fixed and established modes of administration, but which can be made subject to any number of demands asserted and sustained through the undefined and undefinable discretion of Courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the Nation."

United States vs. Guthrie, 17 H., 284.
Decatur vs. Paulding, 14 P., 497.
Elliott vs. Nicholls, 4 Woods, C. C. R., M. S.

The Court of King's Bench, in a late case, say: "Over the Sovereign we can have no power. In like manner when the parties are acting for the Sovereign, whose servants they are, these are not amenable to our prerogative jurisdiction. When the money is paid I can entertain no doubt it is paid to the servants of the Crown."

Queen vs. Lord Com's. L. Rep., 8 Q. B. 387.
1 L. Rep., Q. B. D., 481.
S. C., 2 L. Rep., Q. B. D., 69.
Rastongee vs. Queen.

The result of the inquiry we have made shows that the immunity of sovereigns from civil suits, unless when they consent, is universally enjoyed, and that the States of the Union from the time of their Declaration of Independence have asserted and enjoyed this immunity, except in cases of controversy with one another in respect to their boundaries and jurisdictions. There is no instance of a suit commenced on a contract for the performance of a debt or duty.

The tradition exists that there had been reserved from the dominion of the United States a large residuum of sovereignty, which could not be obtained unless with the consent of two-thirds of the Congress, and of three-fourths of the States. Among these sovereign rights were the undisturbed administration of the State government and the sovereign control of the internal policy of the State; the power to assess, collect and appropriate taxes upon and out of the property of the State; the command of the officers of the State, and the regulation to their duties of the State. The case before the Court is that of a State convoked before it to answer whether she be a debtor to another State, and whether, because of the indebtment, the Court may send its mandate to the officers having the custody of its treasury to hold its contents, or a portion of its contents, subject to the Court's order. The sovereignty of the State extends to everything which exists by its own authority, or is introduced by its own permission, is the lucid description of this Court of what is beyond the power of the Court or of the government to take away from a State. The demand of the bill is that this sovereignty be overturned, and that the Court's officer take the control from the State; that the Court shall decide who are creditors of the State and how the moneys of the State shall be applied in payment. In the report of Hamilton we have cited, made in 1795, to the Senate, he discusses the value of securing the public debt by affording pledges of taxes and revenues. He speaks of the withdrawal of the securities, of the appropriation of the moneys

to the payment of other demands, and of the frequency of such acts. The history of public debts is filled with examples of the diversion of such funds from the objects specified in the acts. There are instances in the history of our own country.

In the Report of Hamilton he does not suggest that the creditor has any remedy in the Courts against the State or the officers of the State. The question is one of political morality.

It cannot be doubted that were the experiment of the plaintiff in this suit to be successful, the whole judicial system of the government would undergo a radical change and modify the Constitution itself.

At the time that the consolidated bonds of Louisiana were issued, it was known to all the holders that the State enjoyed an immunity from suit in any Court of the United States or elsewhere. Those bonds did not constitute contracts in the sense in which that word is used in the Constitution of the United States or the municipal codes.

The "*vinculum juris quo necessitate astringimur alicujus rei solvendæ secundum nostræ civitatis jura;*" the judicial necessity under which an ordinary obligor places himself to fulfil the contract does not exist in respect to a bond issued by the State.

The holder has a promise which he may exhibit to the officers of the treasury of the State, but he cannot enforce performance by the use of the power of the State, nor the power of any functionary of the State. The obligation binds the conscience of the State, and on that the holder must depend. We have seen that this is the only reliance the holder has under the general law of the world.

II.

We now proceed to show the reasons why North Carolina did not adopt the Constitution of the United States at the Convention held at Hillsboro in 1788, for, as stated by Judge Campbell above, "North Carolina declined to ratify the act of the Federal Convention without amendments, and submitted them. She excluded some of the powers I have quoted from the Constitution by her proposed amendments."

By reference to vol IV of Elliot's Debates, page 148, Article third, first and second sections, read:

Mr. Spencer: "I have objections to this article. I object to the exclusive jurisdiction of the Federal Courts in all cases of law and equity arising under the Constitution and laws of the United States, and to the appellate jurisdiction of controversies between the citizens of different States, and a few other instances. To these I object, because I believe they will be oppressive in their operation." * * *

"I know it is said that what is not given up to the United States will be retained by the individual States. I know it ought to be so, and should be so understood; but, sir, it is not declared to be so. In the Confederation it is expressly declared that all rights and powers of any kind whatever of the several States, which are not given up to the United States, are expressly and absolutely retained to be enjoyed by the States." (Page 149, *ibid.*)

And again, on page 161, Judge Spencer returns to the attack. "I hope to be excused from making some observations on what was said yesterday by gentlemen in favor of these two clauses. * * * The gentlemen said that all matters not given up by this form of government were retained by the respective States. I know that it ought to be so; it is the general doctrine, but it is necessary that it be expressly declared, and not left to mere construction and opinion."

To this, General Davie replies: "As to a bill of rights which has been brought forward in a manner I cannot account for, it is unnecessary to say anything. The learned gentleman has said that, by a concurrent jurisdiction, the laws of the United States must necessarily clash with the laws of the individual States, in consequence of which the laws of the States will be obstructed and the State governments absorbed. This cannot be the case. There is not one instance of a power given to the United States, whereby the internal policy or administration of the States is affected. There is no instance that can be pointed out wherein the internal policy of the State can be affected by the judiciary of the United States." (Page 168)

But Judge SPENCER is not satisfied, and further argues: "I do not mean to contend that the laws of the general government should not operate upon individuals. I before observed that this was necessary, as laws could not be put in execution against States without the agency of the sword, which, instead of answering the ends of government, would destroy it. I endeavored to show that, as the government was not to operate against States, but against individuals, the rights of individuals ought to be properly secured. In order to constitute this security, it appears to me that there ought to be a clause in the Constitution, as there was in the Confederation, expressly declaring that every power, jurisdiction and right which are not given up by it remains in the States. Such a clause would render a bill of rights unnecessary. But, as there is no such clause, I contend that there should be a bill of rights, ascertaining and securing the great rights of the States and people." (Page 171.)

The plaintiff below contended that he had a right to bring his suit under the contract clause of the Constitution—that no State shall pass any law impairing the obligation of contracts. This clause came under discussion in the convention held by North Carolina in 1788, while the sixth article was being considered, and was alluded to by Mr. Galloway, as

follows: "But I hope the gentlemen of the committee will advert to the tenth section of the first article. This is a negation which the Constitution of our own State does not impose on us. I wish the committee to attend to that part of it which provides that no State shall pass any law which impairs the obligation of contracts. Our public securities are at a low ebb, and have been so for many years. We well know that the country has taken those securities as specie. This hangs over our heads as a contract. There is a million and a half in circulation, at least. That clause of the Constitution may compel us to make good the nominal value of these securities. I trust this country never will leave it to the hands of the general government to redeem the securities which they have already given. Should this be the case, the consequence will be that they will be purchased by speculators, when the citizens of the State will part with them, perhaps for a very trifling consideration. These speculators will look at the Constitution and see that they will be paid in gold and silver. They will buy them at a half crown in the pound, and get the full nominal value for them in gold and silver. I, therefore, wish the committee to consider whether North Carolina can redeem those securities in the manner most agreeable to her citizens and justifiable to the world, if this Constitution be adopted." (Elliot's D., vol. IV, page 194.)

General Davie replied, and in a manner that was deemed conclusive, as there is no further discussion of the clause:

"Mr. Chairman, I believe that neither the tenth section cited by the gentleman, nor any other part of the Constitution, has vested the general government with power to interfere with the public securities of any State. I will venture to say that the last thing which the general government will attempt to do will be this. They have nothing to do with it. The clause refers merely to contracts between individuals. The section is the best in the Constitution. It is founded on the strongest principles of justice. It is a sec-

tion, in short, which, I thought, would have endeared the Constitution to this country. When the worthy gentleman comes to consider, he will find that the general government cannot possibly interfere with such securities." (*Ibid*, p. 194.)

In the speech of Mr. Willie Jones, in opposition to ratification, occurs this passage: "As great names have been mentioned, I beg leave to mention the authority of Mr. Jefferson, whose great abilities and respectability are well known. When the convention sat in Richmond, Mr. Madison received a letter from him. In that letter he said he wished nine States would adopt it—not because it deserved ratification, but to preserve the Union. But he wished the other four States would reject it, that there might be a certainty of obtaining amendments." (Page 224.)

Judge SPENCER also said: "He always thought it more proper and agreeable to prudence to propose amendments previous rather than subsequent to ratification. He said that, if two or more persons entered into a copartnership, and employed a scrivener to draw up the articles of copartnership in a particular form, and, on reading them, they found them to be erroneous, it would be thought very strange if any of them should say, 'Sign it first, and we shall have it altered hereafter.' If it should be signed before alteration, it would be considered an act of indiscretion. As, therefore, it was a principle of prudence, in matters of private property, not to assent to any obligation till its errors were removed, he thought the principle infinitely more necessary to be attended to in a matter which concerned such a number of people and so many millions yet unborn." (Page 226.)

Judge IREDELL had made a strong appeal to avert, if possible, the pending and unwelcome refusal to ratify, and said: "I think this Constitution safe. I have not heard a single objection which, in my opinion, showed that it was dangerous. Some particular parts have been objected to, and amendments pointed out. Though I think it perfectly safe, yet, with respect to any amendments which do not destroy

the substance of the Constitution, but will tend to give greater satisfaction, I should approve of them, because I should prefer that system which would most tend to conciliate all parties. On these principles, I am of opinion that some amendments should be proposed. The general ground of the objections seems to be, that the power proposed to be granted to the general government may be abused. If we give no power but such as may not be abused, we shall give none, for all delegated power may be abused. There are two extremes equally dangerous to liberty. These are *tyranny* and *anarchy*. The medium between these two is the true government to protect the people. In my opinion, this Constitution is well calculated to guard against both extremes" (page 218); and he surrenders to the inevitable, as follows: "It is useless to contend any longer against a majority that is irresistible. We submit, with the deference that becomes us, to the decision of a majority; but my friends and myself are anxious that something may appear on the journal to show our sentiment on the subject." (Page 237.)

"Sweet are the uses of adversity," and it may be that the noble dissenting opinion in Chisholm vs. Georgia, 2 Dallas, 429, to which reference will be made hereafter, was, in some measure, influenced by the knowledge that the amendments were intended to, and did, control the construction to be given to the Constitution as a whole. While overruled in that case, "the stone rejected of the builders has become the headstone of the corner," and the 11th Amendment makes that opinion the law of the land and a controlling authority in the decision of this case.

The following resolution, offered by Mr. Willie Jones (page 238): "*Resolved*, That a declaration of rights, asserting and securing from encroachment the great principles of civil and religious liberty, and the unalienable rights of the people, together with amendments to the most ambiguous and exceptionable parts of the said Constitution of government, ought to be laid before Congress and the convention of States that

shall or may be called for the purpose of amending the said Constitution, for their consideration, previous to the ratification of the Contitution aforesaid on the part of the State of North Carolina," was adopted by a vote of 184 to 84. (Page 246.)

It is only necessary to call attention to the first and twenty-fifth amendments proposed, which were as follows:

"1st. That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or the departments of the Federal government.

"25th. That Congress shall not, directly or indirectly, either by themselves or through the judiciary, interfere with any one of the States in the redemption of paper money already emitted and now in circulation, or in liquidating and discharging the public securities of any one of the States, but each and every State shall have the exclusive right of making such laws and regulations for the above purposes as they shall think proper." (Pages 240 and 243, *ibid.*)

After the ten amendments had been adopted to the Constitution, the Convention of North Carolina again met in Fayetteville in November, 1789. It was thought that all that had been asked before was substantially conceded, and that articles nine and ten of amendments to the Constitution embraced all that was required in the first and twenty-fifth proposed amendments quoted above The convention then ratified the Constitution by a large majority—194 to 77. It was supposed that the State, at least, retained the right to govern its own citizens, and was not compellable, at their application, by coercion from the Federal judiciary, to discharge its alleged obligations, however contrary to its Constitution they might be.

III.

In Chisholm vs. Georgia, 2 Dall., 434–35, IREDELL, Justice, says: "The principles of law to which reference is to be had, either upon the general ground I first alluded to, or upon the special words I have above cited from the judicial act, I apprehend, can be either—first, those of the particular laws of the State against which the suit is brought; or, second, principles of law common to all the States. * * * But this point (the first), I conceive, it is unnecessary to determine, because I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being when the Constitution was adopted, or at the time the judicial act was passed. * * * The only principles of law, then, that can be regarded are those common to all the States. I know of none such which can affect this case but those that are derived from what is properly termed "the common law," a law which I presume is the ground-work in the laws of every State of the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each State *as it existed in England (unaltered by any statute) at the time of the first settlement of the country.* The statutes of England that are in force in America differ, perhaps, in all the States, and, therefore, it is probable the common law in each is, in some respects, different. But it is certain that, in regard to any common law principle which can influence the question before us, no alteration has been made by any statute which could occasion the least material difference or have any partial effect. No other part of the common law of England, it appears to me, can have any reference to this subject but that part of it which prescribes remedies against the crown. Every State in this Union, in every instance where its sovereignty has not been delegated to the United

States, I consider to be as completely sovereign as the United States are, in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them. Of course the part not surrendered must remain as it did before. (Page 436.) * * * For, admitting that the Constitution is not to have a restrictive operation, so as to confine all cases in which a State is a party exclusively to the Supreme Court (an opinion to which I am strongly inclined), yet there are no words in the definition of the powers of the Circuit Court which give a color to an opinion that, where a suit is brought against a State by a citizen of another State, the Circuit Court could exercise any jurisdiction at all. If they could, however, such jurisdiction, by the very terms of their authority, could only be concurrent with the Courts of the several States. It follows, therefore, unquestionably, I think, that, looking at the act of Congress, which I consider is, on this occasion, the limit of our authority (whatever might further be constitutionally enacted), we can exercise no authority in the present instance, consistently with the clear intention of the act, but such as a proper State Court would have been at least competent to exercise at the time the act was passed."

And on page 445: "Now let us consider the case of a debt due from a State. None can, I apprehend, be directly claimed but in the following instances: 1st. In case of contract with the Legislature itself. 2d. In case of a contract with the executive, or any other person, in consequence of express authority from the Legislature. 3d. In case of a contract with the executive without any special authority. In the first and second cases, the contract is evidently made on the public faith alone. Every man must know that no suit can be brought against a legislative body. His only dependence, therefore, can be that the Legislature, on prin-

ciples of public duty, will make a provision for the execution of their own contract; and if that fails, whatever reproach the Legislature may incur, the case is certainly without remedy in the Courts of the State. * * * In the third case, a contract with the Governor of the State without any special authority: * * * A Governor of a State is a mere executive officer; his general authority is very narrowly limited by the Constitution of the State; with no undefined or disputable prerogatives; without power to affect one shilling of the public money, but as he is authorized under the Constitution or by a particular law."

Page 448: "A State does not owe its origin to the Government of the United States in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself—*the voluntary and deliberate choice of the people.* * * * The people of the State created, the people of the State can only change its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States, that it must be of the republican form."

Page 449 (foot): "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it which will admit, under any circumstances, a compulsive suit for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider can be found in this case) would authorize the deduction of so high a power."

TURNER, ADMINISTRATOR OF STANLEY, PLAINTIFF IN ERROR vs. THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF NORTH AMERICA, DEFENDANTS, 4 Dall., 10: "A Circuit Court, however, is of *limited* jurisdiction, and has cognizance, not of cases generally, but only of a few

specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears."

United States vs. Peters, 5 Cranch, 139, decides: "The right of a State to assert as plaintiff any interest it may have in a subject which forms the matter of controversy between individuals, in one of the Courts of the United States, is not affected by the 11th Amendment; nor can it be so construed as to oust the Court of its jurisdiction, should such claim be suggested. The amendment simply provides that no suit shall be commenced or prosecuted against a State. The State cannot be made a defendant to a suit brought by an individual, but it remains the duty of the Courts of the United States to decide all cases brought before them, by citizens of another State, where a State is not necessarily a defendant. In this case the suit was not instituted against the State or its treasurer, but against the executrixes of D. Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession."

Chief Justice MARSHALL says:

"It is a part of our history that, at the adoption of the Constitution, all the States were greatly indebted, and the apprehension that these debts might be prosecuted in the Federal Courts formed a very serious objection to that instrument. Suits were instituted, and the Court maintained its jurisdiction. The alarm was general, and to quiet the apprehensions that were so extensively entertained this amendment was proposed in Congress and adopted by the State Legislatures. * * * We must ascribe the amendment to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or

from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable extent, and there was reason to retain the jurisdiction of the Courts in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States." Cohens vs. Virginia, 6 Wheat, 406 "The first question to be considered is, whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State." (*Ibid.* Page 378.)

"The counsel for the defendant have laid down the general proposition that a sovereign, independent State is not suable except by its own consent. *This general proposition will not be controverted.* But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides." (*Ibid*, page 380.)

In Horne vs. The State, 84 N. C., 362, it is decided that the jurisdiction of the Supreme Court to hear a claim against the State, based upon the non-payment of interest alleged to be due on a bond issued under an Act of 1869, has been taken away by an amendment of the Constitution, and, in the opinion, it is said: "There has been a prevalent opinion in this State, and one entertained by gentlemen of the highest eminence in the legal profession, that the Legislature of 1868–'69 transcended its limited powers under the

Constitution, in creating the class of bonds to which the one in question belongs, and that they are, therefore, illegal. Whether this opinion is well-founded or not, it is not for us to say, as we believe this Court is precluded, by the said amendment of the Constitution, from going into that inquiry."

Again, in the case of Cohens vs. Virginia, 6 Wheat, 402, it is said: "The citizen who has paid his money to his State, under a law that is void, is in the same situation with every other person who has paid money by mistake. The law raises an assumpsit to return the money, and it is upon this assumpsit that the action is to be maintained. To refuse to comply with this assumpsit may be no more a violation of the Constitution than to refuse to comply with any other, *and as the Federal Courts never had jurisdiction over contracts between a State and its citizens*, it may have none over this."

And again, page 403: "We are also asked if a State should confiscate property secured by a treaty, whether the individual could maintain an action for that property? If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by the State, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land, for that which the treaty secures to him, not against the State for money, which is not secured to him. The case of a State which pays off its own debts with paper money, no more resembles this than do those to which we have already adverted. The Courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity, and that it is still due. *Yet, the Federal Courts have no cognizance of the case.*"

"The first impression made on the mind by this (11th) Amendment is that it was intended for those case and those only, in which some demand against a State is made by an individual in the Courts of the Union. If we consider the causes, to which it is to be traced, we are led to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its own convenience in the adjustment of its debts or other claims upon it; but no interest could be felt in so changing the relation between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the Constitution and laws from active violation."

Cohens vs. Virginia, 6 Wheat, 407.

UNITED STATES BANK VS. PLANTERS BANK, 9 Wheat., 907: "The Planters Bank of Georgia is not the State of Georgia, although the State holds an interest in it. It is, we think, a sound principle that, when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many States of this Union who have an interest in banks are not suable, even in their own Courts; yet they never exempt the corporation from being sued The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character."

In the case of the Governor of Georgia vs. Juan Madrazzo, 1 Peters, 110, it is seen that the opinion of MARSHALL, C. J., is entirely consonant with that which we have cited from Cohens vs. Virginia, 6 Wheat., 402 to 406, and it is only

necessary to refer to the decree, which will be found at page 435: "The Court is of opinion that there is error, * * * the Circuit Court not having jurisdiction of a cause in which the plaintiff asserts a claim upon the State," &c.

THE STATE OF RHODE ISLAND vs. THE STATE OF MASSACHUSETTS, 12 Peters, 718: "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them; the question whether, on the case before a Court, their action is judicial or extrajudicial; with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the Court has jurisdiction. What shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it." (6 Peters, 709; 4 Russell, 415; 3 Peters, 203–7.) * * * "But, as this Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies and parties over which the Constitution and laws authorizes it to act. Any proceeding without the limits prescribed is *coram non judice*, and its action a nullity." (10 Peters, 474; S. P., 4 Russ., 415.) "And, whether the want or excess of power is objected to by a party, or is apparent to the Court, it must surcease its action or proceed extrajudicially. Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two States of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the Federal government, and foreign to each other for all but Federal purposes. So they have been considered by this Court, through a long series of years and cases, to the present term, during which, in the case of the Bank of the United States vs. Daniels, this Court has declared this to be a fundamental

principle of the Constitution, and so we shall consider it in deciding on the present motion." (2 Peters, 590–91.)

"Those States, in their highest sovereign capacity, in the convention of the people thereof, on whom, by the Revolution, the prerogative of the crown and the transcendant power of Parliament devolved in a plenitude unimpaired by any act and controllable by no authority" (6 Wheat., 651; 8 Wheat., 584–88), "adopted the Constitution by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution, it was ordained that this judicial power, in cases where a State was a party, should be exercised by this Court as one of original jurisdiction. The States waived their exemption from judicial power" (6 Wheat., 378–80) "as sovereigns, by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal."

CARY VS. CURTIS, 3 How., 245: "The supremacy of the Constitution over all officers and authorities, both of the Federal and State governments, and the sanctity of the rights guaranteed by it, none will question. These are *concessa* on all sides. The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and most other governments, viz., that the government, as a general rule, claims an exemption from being sued in its own Courts. That, although, as being charged with the administration of the laws, it will resort to those Courts as means of securing this great end, it will not permit itself to be impeached therein, save in instances forming conceded and express exceptions."

In the case of The State of Florida vs. The State of Georgia, 17 How., 478, which was a suit to settle a part of the boundary line, the United States, as proprietor and grantor of lands in the disputed territory, having an interest in the question of the location, the Attorney General, on

filing an information, had leave to adduce evidence, written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States. But this was by a divided Court, and Justices McLean, Daniels, Curtis and Campbell dissented. In the opinion of Justice Curtis, on page 507, he says: "It must be remembered that a State can be sued only by its own consent. This consent has been given in the Constitution, but only in cases having such parties as are there described. The particular character of the parties to the controversy into which the State has consented to enter constitutes not only an essential element of that consent, but it is the sole description of what is agreed to. The State of Georgia has consented to be sued by one or more States, or by foreign States, and by no other person or body politic. The State of Georgia has consented to stand joined as defendant with one or more States, or with a foreign State, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which, by its terms, it does not extend."

And the opinion of Justice Campbell, from page 518 on, reviews the opinion in the case of Chisholm vs. Georgia, 2 Dallas, 419, and cites many of the authorities produced in the brief heretofore referred to

In Beers vs. State of Arkansas, 20 How., 529, it is said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own Courts, or in any other, without its consent and permission, but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant by individuals or by another State; and, as this permission is altogether voluntary on the part of the State, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and

may withdraw its consent whenever it may suppose that justice to the public requires it." And also: "The bill is evidently a suit against the State and others to enforce the payment of money due on certain contracts made by the State, and the State is made a party defendant in the suit." (*Ibid*, 532.)

The bill was dismissed, and it was said by the Court: "The laws and proceedings on the part of the State may have operated harshly and unjustly upon the appellants, but it is not the province of this Court to decide that question. Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State, and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State, and the Courts of the United States are expressly prohibited from exercising such a jurisdiction."

In Chamberlain vs. St. Paul &c. Railroad Co. *et al.*, 92 Otto., 304, Mr. Justice FIELD makes this statement of the case: "Pending these proceedings, the bonds of the State in the hands of the complainant remained unpaid, and they are still unpaid. The faith of the State, solemnly pledged for the payment of both principal and interest, has never been kept. So far from keeping it, the State, as early as November, 1860, adopted an amendment to its Constitution prohibiting any law which levied a tax, or made other provision for such payment, from taking effect until the same had been submitted to a vote of the people and been adopted by them. This prohibition, if not a violation of the State's pledge, conflicts with its spirit. The bonds issued are legal obligations. The State is bound, by every consideration of honor and good faith, to pay them. Were she amenable to the tribunals of the country, as private individuals are, no Court of justice would withhold its judgment against her in an action for their enforcement."

In Georgia vs. Jessup, 106 U. S., 462, it is said: "It may be observed that, if it was not a matter wholly within the discretion of the Circuit Court to permit the State to become a party to the foreclosure suit, it is clear that the State did not ask to become, nor was it in any form made a party to that suit. It is equally clear that it could not have been made a party without its consent."

In the case of Clark vs. Barnard, 108 U. S., 436, it is said: "The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer, and afterwards by the answer of Clark, General Treasurer of the State of Rhode Island, on the ground that the suit was, in effect, brought against the State by citizens of another State contrary to the 11th Amendment to the Constitution of the United States. We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a *claimant* of the fund in Court. The immunity from suits belonging to a State which is respected and protected by the Constitution, within the limit of the judicial power of the United States, is a personal privilege, which it may waive at pleasure; so that, in a suit otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a Court of the United States would be a voluntary submission to its jurisdiction, while, of course, those Courts are always open to it as a suitor in controversies between it and citizens of other States. In the present case, the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as, by its intervention, the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of Georgia vs. Jessup, 106 U. S., 458, where the State expressly

declined to become a party to the suit and appeared only to *protest* against the exercise of jurisdiction by the Court."

In the case of Cunningham vs. Macon and Brunswick Railroad Company, 109 U. S., 450, the Court say: "The failure of several of the States of the Union to pay the debts which they have contracted, and to discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no State can be sued in the ordinary Courts as a defendant, except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations by judicial proceedings to which the State is not a party. These suits have generally been instituted in the Circuit Courts of the United States, or have been removed into them from the State Courts." * * * And also: "It may be accepted as a point of departure unquestioned that neither a State, nor the United States, can be sued as a defendant *in any Court* in this country without their consent, except in the limited class of cases in which the State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution.

"This principal is conceded in all the cases; and, whenever it can be clearly seen that the State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction"

And a quotation is made from the opinion in the case of Board of Liquidation vs. McComb, 92 U. S., 531: "A State, without its consent, cannot be sued as an individual, and a Court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter."

And, in commenting on the case of Louisiana vs. Jumel, it is said, on page 455 (109 U. S.): "The short statement of the reason for this judgment is that, as the State could not be sued or made a party to such proceeding, there was no

jurisdiction in the Circuit Court, either by *mandamus* at law or by a decree in chancery, to take charge of the Treasury of the State, and, seizing the hands of the Treasurer and Auditor, to make distribution of the funds found in the Treasury in the manner which the Court might think just."

And, also, on page 457: "If any branch of the State government has power to give plaintiff relief, it is the Legislature. Why is it not sued as a body, or its members, by *mandamus*, to compel them to provide means for the State's indorsement? The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial proce-s."

In Bonner vs. United States, 9 Wall., 159, it is said: "Immunity from suit is an incident of sovereignty, but the government of the United States, in a spirit of great liberality, waived that immunity in favor of those persons who had claims against it which were founded upon any law of Congress or regulation of an executive department, or upon any contract with it, express or implied, and gave the Court of Claims the power to hear and determine cases of this nature. * * * As the government has not thought fit to allow itself to be sued in the Court of Claims on equitable considerations, it follows that the remedy of the claimant, if any now exists, is with Congress." And the present is like Case vs. Terrell, 11 Wall., 203, where it is said: "The manifest purpose of the proceeding was to subject the government to a tribunal which could rightfully exercise no jurisdiction in the premises."

And, in the Virginia Coupon Cases, 114 U. S., 293, it is said by Judge MATTHEWS: "Tried by every test which has been judicially suggested for the determination of the question, this cannot be considered to be a suit against the State. The State is not named as a party in the record. The action is not directly upon the contract; it is not for the purpose of controlling the discretion of executive officers, or administering funds actually in the public Treasury, as was held

to be the case in Louisiana vs. Jumel, 107 U. S., 711. It is not an attempt to compel officers of the State to do the acts which constitute a performance of its contract by the State, as suggested by the minority of the Court in Antoni vs. Greenhow, 107 U. S., 769–783."

And in the last named case Mr. Justice MATTHEWS thus states the ground on which he concurs in the judgment of the Court: "I agree that the State of Virginia, by the Act of 1871, entered into a valid contract with the holders of its bonds to receive their coupons in the payment of taxes; and that any subsequent statute, which denies this right, is a breach of its contract and a violation of the Constitution of the United States. But for a breach of its contract, by a State, no remedy is provided by the Constitution of the United States against the State itself. If the State furnishes a remedy by process against itself, or its officers, that process may be pursued because it has consented to submit itself to that extent to the jurisdiction of the Courts; but if it chooses to withdraw its consent, by the repeal of all remedies, it is restored to the immunity from suit which belongs to it as a political community responsible, in that particular, to no superior." * * * "I do not, therefore, consider it necessary to enter upon the inquiry, whether the remedy provided by the State of Virginia, by the Act of 1882, is effective and substantial, compared with that which existed in 1871, when the bonds were issued. It is sufficient to say that it is the one which the State has chosen to give, and the only one, therefore, which the Courts of the United States are authorized to administer."

And in Marye vs. Parsons, 114 U. S., p. 328, Mr. Justice MATTHEWS, who delivers the opinion of the Court, says: "This bill is without precedent, and should have been dismissed. It is a clear case as stated of *damnum absque injuria*. So far as the contract with the plaintiff was, that the State should pay him his coupons at maturity, there is

no doubt a breach; but he asks no relief as to that, for there is no remedy by suit to compel a State to pay its debts."

This part of the dissenting opinion of Mr. Justice BRADLEY, in Marye vs. Parsons, found in 114 U. S., on p. 337, does not seem to be questioned in the opinion delivered by Mr. Justice MATTHEWS: "The 11th Amendment, it is true, does not prohibit the extension of the judicial power of the United States to suits prosecuted against a State by its own citizens. But the evident reason of this is, that the judicial power was not granted to the United States by the original Constitution in such cases; hence, as it was not granted, it was not deemed necessary to prohibit it. It was evidently supposed that the control of all litigation against a State by its own citizens was in its own hands, amongst that mass of rights, which were reserved to the States and the people. It would be very strange to say that, although a State cannot, in any case, be sued by a citizen of another State since the adoption of the 11th Amendment, yet, in a case arising under the Constitution and laws of the United States, it may be sued by its own citizens. This would be to deprive the State, with regard to its own citizens, of its sovereign right of exemption from suit. It seems to us that the absurdity of this proposition is its sufficient answer. Unless the State chooses to allow itself to be sued, it cannot be sued—it has this prerogative, if no other. It is admitted, in point of form, that it cannot be sued by citizens of other States or of foreign States, because of the 11th Amendment. The whole argument of the opinions of the majority of the Court is devoted to the object of showing that the State is not sued in the suits under consideration. We do not remember that it is anywhere contended that the State can be sued by its own citizens against its own law, merely because the 11th Amendment does not, in terms, extend to that case." This is in strict accordance with the opinion of Mr. Justice MATTHEWS in Antoni vs. Greenhow, heretofore cited.

In Poindexter vs. Greenhow, Mr. Justice MATTHEWS, on page 281 of 114 U. S., says, in speaking of Antoni vs. Greenhow (107 U. S.), and contrasting it with the case under discussion: "That was a case in which it was sought by *mandamus* specifically to enforce the contract of the State with the coupon holder, by compelling, by affirmative action and process of law, the collector actually to receive the coupons tendered in satisfaction of taxes. It left unaffected the right of the coupon holder and tax-payer, after his tender had been unlawfully refused, to stand upon his contract and the law, in defence of his rights, both of person and property, against all unlawful assaults and seizures. In the former he was an actor, seeking affirmative relief to compel the specific performance of the contract. In the latter he is a defendant, passively resting on his rights, and resisting only demands and exactions sought to be enforced against him in denial of them."

Again, in this case, on page 279, it is said, in speaking of the State bonds, issued before 1871: "The latter depended for their payment, as to both principal and interest, upon the continued good faith of the State, in making, from time to time, necessary appropriations out of the public treasury to meet its recurring liabilities by positive legislation to that effect. In case of default there was no remedy by legal process. *The State itself could not be sued.* Its bare promise to pay had no sanction but the public sense of duty to the public creditors. The only security for their performance was the public faith." How does our case differ?

And also, on page 286: "It is true that no remedy for a breach of its contract by the State, by way of damages, as compensation, or *by means of process to compel its performance, is open under the Constitution* in the Courts of the United States by a direct *suit against the State itself on the part* of the injured party, being a citizen of another State, or a citizen or subject of a foreign State." Unless the plaintiff is seeking a *mandamus*, what redress does he want? What can

a Court of Equity do? Is not his case similar to that of Marye vs. Parsons, in which it is said, 114 U. S., p. 329: "The bill as framed, therefore, calls for a declaration of an abstract character, that the contract set out requiring coupons to be received in payment of taxes and debts due the State is valid; that the statutes of the General Assembly of Virginia, impairing its obligations, are contrary to the Constitution of the United States, and, therefore, void; and that it is the legal duty of the collecting officers of the State to receive them, when offered, in payment of such taxes and debts. But no Court sits to determine questions of law *in thesi*. There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to persons or property. All questions of law arising in such cases are judicially determinable. The present is not a case of that description."

IV.

That the suit against the Auditor cannot be maintained, even after the suit against the State is dismissed, we think, is clear upon the following authorities:

In Louisiana vs. Jumel, 107 U. S., p. 720, it is said: "The bonds and coupons, which the parties to these suits hold, have not been reduced to judgment, and there is no way in which the State, in its capacity as an organized political community, can be brought before any Court of the State or of the United States, to answer a suit, in the name of these holders, to obtain such a judgment. It was expressly decided by the Supreme Court of the State in State *ex rel* Hart vs. Burke, 33 La., p. 498, that such a suit could not be brought in the State Courts, and under the 11th Amendment of the Constitution, no State can be sued in the Courts of the United States by a citizen of another State. Neither was there when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the State Courts, or elsewhere, either by *mandamus* or injunction against the State, in its political capacity, to compel it to do what it has agreed should be done, but which it refuses to do. These, then, are suits by creditors at large of the class provided for in the Act of 1874, to compel, by judicial process, the officers of the State to enforce the provisions of the Act, when the State, by an amendment to its Constitution, has undertaken to prohibit them from doing so, and when the Court, if it requires an officer to proceed, cannot protect him with a judgment to which the State is a party. The persons sued are the executive officers of the State, and they are proceeded against in their official capacity." * * * "That the Constitution of 1879, on its face, takes away the power of the executive officers to comply with the terms of the Act of 1874 cannot be denied. As against everything, but the outstanding bonds and coupons, this Constitution is the fundamental law of the State, and it

is only invalid so far as it impairs the obligation of the contract, on the faith of which the bonds and coupons were taken by their respective holders. (Cited in 117 U. S., p. 68.) The question then is, whether the contract can be enforced, notwithstanding the Constitution, by coercing agents and *officers* of the State, whose authority has been withdrawn in violation of the contract. without the State itself, in its political capacity, being a party to the proceedings. The relief asked will require the officers, against whom the process is issued, to act contrary to the positive order of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible, in law, for what they do. They must use the public money, in the treasury and under their official control in one way, when the superior power has directed them to use it in another, *and they must raise more money by taxation* when the same power has declared *it shall not be done.*" * * * "The remedy sought implies power in the judiciary to compel the State to abide by and perform its contract for the payment of money. not by rendering and enforcing a judgment in the ordinary form of judicial procedure, *but by assuming the control of the administration of the fiscal affairs of the State*, to the extent that may be necessary to accomplish the end in view." * * * "The provision in the law, that it shall be the duty of the Auditor, Treasurer, and the board, respectively, to collect the tax, pay the interest, and redeem the bonds, evidently means no more than that the Auditor and Treasurer shall perform their respective duties under the general laws, in the assessment and collection of the tax, and should pay, in the usual manner, the interest and principal of the bonds, as they respectively fall due, and that the board shall purchasé and retire the bonds, whenever there is a surplus which, under the law, is to be used for that purpose." * * * "If there is any trust, the State is the trustee, and unless the State can be sued, the trustee cannot be enjoined." (Quoted in Hagood vs. Southern, 117 U. S., p. 70.) "The officers owe duty to the State alone, and have no contract

relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any other control over the fund, except to keep it like other funds, in the treasury, and pay it out according to law. They can be moved through the State, but not the State *through them.*" (Quoted in Hagood vs. Southern, 117 U. S., p. 70.) And, in Reg. vs. Lords Commissioners of the Treasury, L. R. 72 B., 387, BLACKBURN, J., says: "It seems to me that the obligation, such as it is, is upon her Majesty, to be discharged through her servants, and you cannot proceed therefor against the servants." "So here the obligation is all on the State to be discharged through its servants."

"Little need be said with special reference to the suit for *mandamus.* In this no trust is involved, but the simple question presented is, whether a single bondholder, or a committee of bondholders, can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform, generally, their several duties under the law. The relators do not occupy the position of creditors of the State, demanding payment from an executive officer charged with the ministerial duty of taking the money from the public Treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. What they ask is, that the Auditor of the State, the Treasurer of the State, and the Board of Liquidation may be required to enforce the Act of 1874, and "carry out, perform and discharge each and every one of the ministerial acts, things and duties, respectively, required of them, * * * according to the full and true intent and purport of the act."

"Certainly no suit begun in the Circuit Court for such relief would be entertained, for that Court can, ordinarily, grant a writ of *mandamus* only in aid of some existing jurisdiction."

Bath Co. vs. Avery, 13 Wall., 244.

Davenport vs. Co. Dodge, 105 U. S., 237.

Our attention has been called to no case in the Courts of Louisiana in which such general relief has been afforded, and the jurisdiction of the Circuit Court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed, a question we do not deem it necessary now to decide. (U. S., page 68.) The remedy sought, in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a Court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and, if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the Courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State (quoted in Hagood vs. Southern, 117 U. S., p. 68.) In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.

Jumel vs. Louisiana, 107 U. S., 727–728.

The question involved here has, also, been again before the Supreme Court in Hagood vs. Southern, 117 U. S., and, on page 65, it is said: "But it is urged, with earnestness and zeal, that the complainants Williams and Wesley are enti-

tled to so much of the relief prayed for as, in effect, would operate to compel the Comptroller General of the State to execute, in their favor, the provisions of the Act of March 2, 1872, relating to the levy, collection and application of the tax pledged by the fourth section of that act to the redemption of the revenue bond scrip. The ground on which that relief is based, of course, is that the Act of March 2, 1872, must still be regarded as subsisting, notwithstanding the subsequent formal repeal by the Legislature, which must be treated as null and void, because it impairs and destroys the obligation of the contract between the holders of these certificates of indebtedness and the State of South Carolina. Treating the repealing acts, then, as of no force, the inference is drawn that the duty of the officers of the State remains as declared and defined by the Act of March 2, 1872, and its performance may be enforced by judicial process in behalf of any one having an interest in the subject.

"It must be borne in mind, however, that the State of South Carolina denies the existence and validity of the alleged contract. It asserts that the revenue bond scrip was issued in violation of the Constitution, which provides (Art. IX, § 7) that public debts may be contracted for the purpose of defraying extraordinary expenditures.

"SEC. 10. That no scrip, certificate, or other evidence of State indebtedness, shall be issued except for the redemption of stock, bonds, or other evidences of indebtedness, previously issued."

And "SEC. 14. That any debt contracted by the State shall be by loan or State bonds of amounts not less than $50 each, and interest, payable within twenty years after the final passage of the law authorizing such debts." * * *

"It thus appears that a distinct issue is made by the State of South Carolina with the holders of this revenue bond scrip, and the controversy between them and the State involves the very question of the existence and obligation of the alleged contract. This controversy the State has

undertaken to settle for itself. By its legislative department it has repealed the statutes authorizing its officers to execute the contract on its behalf, and forbidden the levy, collection and appropriation of taxes for payment of the scrip." (*Ibid*, page 66.)

The controversy, in which the validity and obligation of the scrip is involved, is the subject of the present suits. The complainants, as holders of this scrip, in behalf of themselves and all other holders choosing to take part, are seeking to obtain, by judicial process, its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection and appropriation of special taxes, pledged to that purpose, as they claim, by irrepealable law, constituting a contract protected from violation by the Constitution of the United States. And such are the decrees which have been rendered according to the prayers of the bills. These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, *who are the only parties to it.* But to these bills the State is not, in name, made a party defendant, though leave is given to it to become such if it chooses, and, except with that consent, it could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed—the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit and defending only as representing the State, and the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore,

substantially within the prohibition of the 11th Amendment to the Constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit at law, or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." The case comes, thus, directly within the authority of Louisiana vs Jumel, 107 U. S, 711." (*Ibid*, page 67.)

"If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be. If the State is named as a defendant, it can only be reached by *mesne* or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the Court, is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, What would constitute such a proceeding? In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office."

Hagood vs. Southern, 117 U. S., 69.

The defendants in the present cases, though officers of the State, are not authorized to enter its appearance to the suits and to defend for it in its name. The complainants are not entitled to compel its appearance, for the State cannot be sued without its consent; and the Court cannot proceed to the determination of a cause and controversy to which the State is an indispensable party without its presence. This,

however, the Circuit Court has, in fact, done; and the decrees undertake to dispose of the matter in controversy and enforce the judgment of the Court against the State, through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit. For these reasons, the decrees of the Circuit Court are reversed, and the causes are remanded, with instructions to dismiss the bills of complaint.

Hagood vs. Southern, 117 U. S., 71.

T. F. DAVIDSON,
Attorney General.
R. H. BATTLE,
JOHN W. GRAHAM,
Counsel for Appellants.

APPENDIX.

At the General Court of the
Commonwealth of Massachusetts,
Saturday, June 22d, 1793.

In Senate. Ordered, that Thomas Adams, within six weeks from this time, cause to be printed for the use of the members of the Legislature, three hundred copies of a case, decided in the Supreme Judicial Court of the United States in February last, in which is discussed the question, whether a State is liable to be sued by a private citizen of another State; and deliver the same to the Secretary, who is hereby directed to distribute the same among the several members aforesaid, as soon as circumstances will permit, without expense to the State.

In the House of Representatives read and concurred.

Commonwealth of Massachusetts.
Secretary's Department,
August 3d, 1880.

L. S.

A true copy:

Witness the Seal of the Commonwealth.

HENRY B. PEIRCE,
Secretary of the Commonwealth.

COMMONWEALTH OF MASSACHUSETTS,

BOSTON, *September 18th, 1793.*

This being the day for the meeting of the General Court, agreeably to the Proclamation of the Governor.

The Governor came in and addressed the Legislature as follows, viz:

Mr. President and Gentlemen of the Senate,

Mr. Speaker and Gentlemen of the House of Representatives.

The Proclamation by which the General Court is convened, contains a copy of a civil precept. The service of which on me, and on the Attorney General, was the principal reason of my exercising this part of that authority devolved on me by the Constitution.

This suit commenced by William Vassall, if the Commonwealth is held to answer thereon, must be decided on principles very interesting to its welfare as a State.

I cannot conceive that the people of this Commonwealth, when they, by their Representatives in convention, adopted the Constitution of a General Government, expected that each State should be held liable to answer on *compulsory civil process*, to every individual resident in another State or in a foreign kingdom. Three Judges of the United States of America having solemnly given it as their opinion that, the several States are thus liable, the question, then, has become highly important to the people.

I did not find myself authorized in virtue of my office, as Governor of the Commonwealth, to appear, either by myself or by my substitute, in any Court of Justice, either to deny the authority of the Court over this government, or to submit to its jurisdiction, in a point which I cannot at present consider as settled. Nor did I conceive that any other person could have the authority, without a special appointment by the Legislature for that purpose.

The service of this process being laid before the Council, they advised me to call the two Houses into session. My opinion accords with their advice for several reasons, some of which are too obvious to need repeating, others I will suggest to you.

The demand of William Vassall, if I am not mistaken in his design, and in the tendency of the process, will involve and conclude a question of legality on the mode of confiscating the personal estate of that class of people who, in our laws, are denominated Absentees. It is, therefore, necessary that effectual measures should be speedily adopted to prevent a determination which may so greatly injure the interest, and so disagreeably affect the feelings of the citizens of this Commonwealth.

Should you, gentlemen, be of opinion that by the Constitution of the United States the Commonwealth may be compelled to answer on this process, you will make such provision for defending against the suit as shall appear to you to be proper and expedient.

Should you consider the Commonwealth not to be thus liable, your deliberations will be such as will tend to procure to the Constitution, under which this authority is claimed, a more favorable, and more unexceptionable construction; but it may happen that your investigations may lead you to conclude that the construction given to the judiciary power of the United States by three of the Judges is right, according to the letter of the Constitution, and yet, that it will tend to the promotion of peace and harmony in the Union, and to the preservation of our Federal government, so happily established to procure such alteration in the judiciary article, as may secure the States severally in the enjoyment of that share of sovereignty which it was intended they should retain and possess. In this last case you will direct your measures to that point.

From these considerations I considered it as absolutely necessary that you should be in session at an earlier day than

that to which the general Court stood adjourned. Your deliberations on this subject will take some time, and though Congress will meet on the first Monday in December, yet their session may be short: you could not, therefore, after the last Wednesday in January, have time to do what will be necessary. The Court, too, where this suit is pending, will be in session early in February, and the result of the business will be then expected.

I avoid giving an opinion either on the question whether the Commonwealth is liable to be sued, or whether, if it is so circumstanced, an attempt to procure an alteration is eligible. Yet, I consider it to be of the last importance to the happiness and interest of the United States, as well in their united as in their separate capacity, to have this point properly, satisfactorily and finally settled. It is true that States, Kingdoms and Empires ought to do justice, but it is as true that there are certain inherent principles in the Constitution of each, which can never be surrendered, without essentially changing the nature, or perhaps destroying the existence of the government.

I believe that the Commonwealth of Massachusetts, from the generosity and good feelings of the citizens, will be always ready, as far as the people's ability shall admit of, to do justice to all men. Yet, in order to preserve the peace and safety of the Union, and to establish, in the bosom of other nations, a confidence in the rectitude of this, it is very proper that there should be a tribunal of justice, independent of the particular States, which may be resorted to in certain cases. This was intended to be provided for by the Federal Constitution; but whether the present case is properly before that tribunal according to that Constitution, or whether the process under consideration is within the intendment of that provision, you will consider.

Whether the provision in the Federal Constitution for the extension of the judiciary power to States is intended to be exercised in matters of civil contract, or in other matters

which took place before the government was formed; or whether it is intended only to give a remedy for such injuries as may take place by force, and may thereafter have a tendency to destroy the peace of the Union, or to involve the nation in a war with a foreign power, is of consequence enough to demand a consideration. If the judiciary power of the Union is to be exercised on questions of civil contracts made by a State, the decision must be had, either on the laws of the State against which the demand is made, or on those of the State or Kingdom to which the demandant belongs, or on the laws of the United States The absurdity of the two first need not be pointed out, but the other would render the Legislative authority of Congress over the particular States, as mere corporations, commensurate to the claim of the judiciary power.

Where the demand shall be for a recompense of damages resulting from an injury, there the law of nations, the Constitution of the United States and existing treaties, will govern the decision. And even in that case it will be a question, whether it is intended that each State shall be liable, on civil process, to be drawn to the seat of the Federal government, and there tried by a jury of the vicinage, in the same manner as a corporation would be treated.

Congress, no doubt, should you instruct your Senators on the subject, will take time to consider these questions in proportion to the important light they may appear in.

The Legislature of the Union has never yet contemplated this subject, for in the establishment of the judiciary system it is entirely neglected. No mention is made in the Acts of Congress of the suability of a State, nor is there any process against a State provided for in the laws of the United States.

Gentlemen of the Senate, and

Gentlemen of the House of Representatives.

When the government of the United States was proposed to the people's consideration, I then was, and yet am, deeply impressed with the necessity of a more perfect union of the States than at that time existed, and, therefore, exerted the share of influence which I possessed, in favor of its being adopted. I then considered it as being by no means explicit in the description of the powers intended to be delegated, but trusted that the wisdom of the people would very soon render every part of it definite and certain. The idea that it is dangerous to examine systems of government, and to compare the effects produced by their administration, with the principles on which they were raised, is inadmissible among a free people. If the people are capable of practicing on a free government, they are able, without disorders or convulsions, to examine, alter and amend the systems which they have ordained. And it is of great consequence to the freedom of a nation to review its civil Constitution, and to compare the practice under it, with the principles upon which it depends. The tendency of every measure, and the effect of every precedent, ought to be scrupulously attended to, and critically examined. This is the business of the Representatives of the people, and can never be by them confided to any other persons.

The great object presented to us by our political situation, is the support of the general government, the giving force and efficacy to its functions, without destroying the powers which the people intended to vest and reserve in the State governments.

A consolidation of all the States into one government, would at once endanger the nation as a Republic, and eventually divide the States united, or eradicate the principles which we have contended for.

It is much less hazardous to prevent the establishment of a dangerous precedent, than to attempt an abolition of it, after it has obtained a place in a civil institution.

Your fellow citizens anxiously wait the event of your deliberations on the important business before you. And I, as one of them, rest satisfied that the result will be such, as will establish the rights of the Commonwealth and give support and efficacy to the general government. In this view, and in every other, in which the peace, liberty, and safety of our fellow citizens, not only of this State, but of the United States are concerned, rest assured, Gentlemen, that no effort nor zeal on my part shall be wanting. I shall, therefore, only add I will do everything in my power to expedite the business of the session, and to render it as little expensive to our constituents as exigencies will admit.

COUNCIL CHAMBER, BOSTON, *September 18th, 1793.*

JOHN HANCOCK.

SECRETARY'S DEPARTMENT,

BOSTON, *August 3d, A. D, 1880.*

L. S. A true copy of the Record:

Witness the Seal of the Commonwealth.

HENRY B. PEIRCE,
Secretary of the Commonwealth.

FRIDAY, *September 27th, 1793.*

In Senate. WHEREAS, a decision has been had in the Supreme Judicial Court of the United States, that a State may be sued in the said Court by a citizen of another State, which decision appears to have been grounded on the second

section of the third article of the Constitution of the United States.

Resolved, That a power claimed, or which may be claimed, of compelling a State to be made defendant in any Court of the United States at the suit of an individual or individuals, is, in the opinion of this Legislature, unnecessary and inexpedient, and, in its exercise, dangerous to the peace, safety and independence of the several States, and repugnant to the first principles of a Federal government.

Therefore resolved, That the Senators from this State in the Congress of the United States be, and they hereby are instructed, and the Representatives requested, to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States, as will remove any clause or article of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual, or individuals, in any Court of the United States.

And his Excellency the Governor is hereby requested to communicate the foregoing resolves to the Supreme Executives of the several States, to be submitted to the consideration of their respective Legislatures.

In the House of Representatives read and concurred.

APPROVED BY THE GOVERNOR,

SECRETARY'S DEPARTMENT,

BOSTON, *August 3d, 1880.*

L. S. A true copy:

HERNY B. PEIRCE,

Secretary of the Commonwealth.

FRIDAY, *September 27th, 1793.*

The two branches of the Legislature returned the following answer to the Governor's speech:

To His Excellency JOHN HANCOCK, *Esq., Governor of the Commonwealth of Massachusetts:*

May it please your Excellency:

The resolution adopted upon the subject on which the Legislature has been convened, will convince your Excellency how justly we appreciate the vigilance and propriety of your conduct on this interesting occasion.

With respect to the suit of William Vassall against the Commonwealth no answer will be made, but, at the same time, it may not be improper to observe, that if he shall exhibit to the Legislature an equitable claim against the Commonwealth, in the manner heretofore practiced, justice will be extended to him, in common with all others.

The Legislature need only add, Sir, that they earnestly wish for the happy recovery and re-establishment of your Excellency's health, as a relief and comfort to your friends, and a blessing to your country.

COMMONWEALTH OF MASSACHUSETTS,
SECRETARY'S DEPARTMENT,
BOSTON, *August 3d, 1880.*

L. S. A true copy of Record:

Witness the Seal of the Commonwealth.

HENRY B. PEIRCE,
Secretary of the Commonwealth.

EXTRACTS FROM JOURNAL OF THE "HOUSE OF DELEGATES OF VIRGINIA."

TUESDAY, *26th November, 1793.*

The House, according to the order of the day, resolved itself into a committee of the whole House on the state of the Commonwealth, and, after some time spent therein, Mr. Speaker resumed the chair, and Mr. King reported that the committee had, according to order, had the state of the Commonwealth under consideration, and, after some time spent therein, Mr. Speaker resumed the chair, and Mr. King reported that the committee had according to a resolution thereupon, which he read in his place and afterwards delivered in at the Clerk's table, when the same was again read, and is as followeth:

WHEREAS, The power adjudged to be founded on the 2d section of the 3d Article of the Constitution of the United States, of compelling a State to appear in the Supreme Federal Court to answer the complaint of any individual or individuals, is, in the opinion of the General Assembly, unnecessary and inexpedient, and its exercise dangerous to the peace, safety and independence of the several States, and tend to a general consolidation—

Resolved unanimously, That the Senators representing this State in the Senate of the United States be and they are hereby instructed, and the Representatives requested, to unite their utmost and earliest exertions with the Senators and Representatives from other States coinciding in sentiment with this State, to obtain such amendments in the Constitution of the United States as will remove or explain any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States; and that the Governor is

hereby requested to communicate the foregoing resolve to the Supreme Executives of the several States to be submitted to the consideration of their respective Legislatures.

On Thursday, 28th November, 1793, the House proceeded to consider the resolution reported from the committee of the whole House on the state of the Commonwealth on Tuesday last, which lay on the table, and the same being twice read, was amended and agreed to by the House, as follows:

Resolved, That a State cannot, under the Constitution of the United States, be made a defendant at the suit of any individual or individuals, and that the decision of the Supreme Federal Court that a State may be placed in that situation is incompatible with, and dangerous to, the sovereignty and independence of the individual States, as the same tends to a general consolidation of these confederated republics.

Resolved unanimously, That the Senators representing this State in the Senate of the United States be and they are hereby instructed, and the Representatives requested, to unite their utmost and earliest exertions with the Senators and Representatives from other States, coinciding in sentiment with this State, to obtain such amendments in the Constitution of the United States as will remove or explain any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States; and that the Governor is hereby requested to communicate the foregoing resolve to the Supreme Executives of the several States to be submitted to the consideration of their respective Legislatures.

This was agreed to by the Senate on December 3d, 1793. This act of the Legislature is reported in Statutes-at-Large, vol. 1st, 1792 to 1795, page 284.

RESOLUTIONS OF NORTH CAROLINA RELATING TO THE DECISION OF THE FEDERAL JUDICIARY THAT A STATE MAY BE SUED BY AN INDIVIDUAL.

NORTH CAROLINA, IN SENATE,

4th January, 1794.

WHEREAS, It hath been determined in the Supreme Federal Court of the United States that a State may be sued by an individual or individuals in said Court—

Resolved, That such a power, however it might have been contemplated by some, was not generally conceived by the representatives of this State in the convention which adopted the Federal Constitution as a power to be vested in the judiciary of the general government, and that this General Assembly view the same as derogatory of the reserved rights and sovereignty of this State.

Resolved, That the Senators from this State in the Senate of the United States be and they are hereby instructed, and the Representatives requested, to take the most speedy and effectual measures to obtain such amendments to the Constitution of the United States as will remove or explain any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.

Resolved, That nothing in the foregoing resolutions contained shall operate to prohibit the Senators and Representatives of this State from co-operating with the members of other States in proposing such other amendments to the Federal Constitution as to them may appear calculated to secure the sovereignty of the several States and to promote the true interests of the people.

Resolved, That his Excellency the Governor is hereby requested to communicate the foregoing resolves to the Supreme Executive of the United States, and to the Senators and Representatives from this State to the Congress of the United States.

By order. WM. LENOIR, *S. S.*

S. HAYWOOD, *C. S.*

In the House of Commons, 11th January, 1794, read and concurred in.

By order. J. LEIGH, *S. H. C.*

J. C. HUNT, *C. H. C.*

Court
FILED
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 392.

THE STATE OF NORTH CAROLINA AND W. P. ROBERTS, AUDITOR, APPELLANTS,

against

A. H. TEMPLE.

BRIEF FOR TEMPLE, by S. F. PHILLIPS.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 392.

THE STATE OF NORTH CAROLINA AND W. P. ROBERTS, AUDITOR, APPELLANTS,

against

A. H. TEMPLE.

BRIEF FOR TEMPLE.

The record is believed to present the question *whether a State is in any case amenable in invitum to the judicial power of the United States, as defendant in a civil suit brought by one of its own citizens for a violation of rights of private property guarantied by the Constitution.*

The suit was begun by Temple by filing a bill in equity, April 12, 1886, against the State itself and its auditor, on behalf of himself and all who might come in, &c., alleging that he holds, to the amount of same $9,900, certain past-due coupons taken from bonds issued for value by the State in

June, 1869; that previously to such issue the State, in order to give such bonds and coupons credit, levied by statute a tax, to be thereafter raised annually by its auditor, &c., *toties quoties*, for the redemption of the same; that subsequently, in 1870, &c., it by statute forbade such tax to be further raised, or such bonds, &c., to be paid, and that ever since, although demand therefor has been made, payment has been refused

Upon the same day subpœnas were served upon the governor and the attorney general, as representing the State, and also upon the auditor.

At June rule day the attorney general and other counsel came in and suggesting that the "State does not consent to be a party defendant" to the suit, moved to dismiss the same; and upon behalf of the auditor at the same time demurred generally.

At November term, 1886, the motion and demurrer were argued before Judges Bond and Seymour, and thereupon an *advisari* was taken.

At June term, 1887, the same judges being present, a division of opinion was announced; and thereafter, in accordance with the opinion of the presiding judge, the defendants waiving an account, a decree was rendered against the State for $15,445, principal and interest, and the auditor was directed to collect the necessary tax, &c.

From this decree an appeal has been taken, the question in difference certified being—

"*Whether such such suit can be maintained in this court against said State by the complainant, he being one of the citizens thereof.*"

This action has been brought upon the theory that the act of 1875, ch. 137, which first conferred upon circuit courts jurisdiction of all suits of a civil nature at common law or in equity, &c., &c., arising under the Constitution or laws of the United States, thereby *substantially*, *first*, rendered it a practical question whether a State could be sued in courts of

the United States by its own citizens for impairing by law the obligation of its own contracts with themselves.

Another theory involved in this case is that at common law Government is one of the persons liable to be sued for violations of contracts in such of its own courts as have jurisdiction of such violations in general. In other words, if a certain court, either at common law or by general statutory words, has jurisdiction of certain cases, it thereby, at common law, has jurisdiction of them, even although Government (i. e., the *King*, or a *State*) be party thereto whether as plaintiff or defendant. Inasmuch as this is a principle so far only as the *common law* operates, it follows that ordinarily such jurisdiction can be negatived by any competent *statute*. In the absence of such statute, however, it exists. Therefore if a statute by general words, as above, confers upon a court jurisdiction of *cases arising under the Constitution of the United States*, by an application of the common law to the interpretation of such provision it is seen that if a State be party to such a violation of that Constitution as under general principles warrants remedy by the *judicial power* IT becomes subject to that jurisdiction; and also that, inasmuch as a State can pass no statute to affect the common law *in that connection*, this jurisdiction continues irrespective of any such statute; and therefore, *a fortiori*, irrespective of any other State action, ex. gr., dissent thereto by its executive or by its attorneys.

The present case, therefore, is one of an application of the common law to a statute passed in 1875. The *pinch* of the case is thought to be as to what is the common law upon the point just stated. If that be as above alleged the rest of the argument may be comparatively plain.

The case is believed to be unembarrassed by objections to the effect that the *dignity* of a State forbids its general amenability at common law to its own courts for such matters.

For it must be so amenable before some one of its own organs; the contention here being only that upon matters affecting *rights of property* of others general principles of law show that the organ in charge thereof must be, not the Legislature nor the Executive, but the Judiciary. The right of a State to be *acquit* of an alleged claim of property upon the part of some other person can at common law or under our constitution be made good only by the Judiciary, whose peculiar function it is to solve such questions. Therefore when a claimant summons it to come before such organ no question of dignity is involved.

In the meantime, it is to be borne in mind that courts of the United States are *domestic courts of each of the States* for all cases to which such State or any of its citizens is a party.

The objection upon the score of *dignity*, so far as a matter of law, will be seen hereafter to have been made in America, because, as is submitted, of inadvertency to the *reason* of its application in England to suits against the Crown. "Dignity" there forbade, at common law, only *the use against the King of the ordinary process by which subjects were brought before courts.* But the same common law, on behalf of the rights of property of subjects against the Crown, during its very earliest years (temp. Edward I) employed another irresistible process for bringing the latter before his courts, the effectiveness of which shows that the *dignity* in question was concerned only with the particular process by *original writ*, and had no relation to the King's obligation in respect of such rights to appear before his own organs for distributing justice.

The process so resorted to was indeed *virtually* as imperative as an original writ, but this sort of *dignity*, which is always greatly concerned about *form*—if indeed its essence do not consist of it, was thought to be saved by the absence of express command! And here a doubt arises as to how far

the word "dignity" is a *forensic* expression in discussions upon *law: i. e.*, how far it is of a definition so well ascertained as not to introduce more obscurity and confusion into a legal discussion that it takes away. *Lord Somers* said upon a celebrated occasion, when pressed as he thought by a like argument *ad invidiam*, (in which it was attempted to obviate a specific legal argument by means of general declamation about the *subject's property:*) "The subject is as safe in his property, and as secure in the method of coming at it when detained, as by the English constitution he ought to be." (14 State Trials, p. 45.) So it may be well said about the "*dignity*" [as also the "*sovereignty*"] of American governments, State and National, that *this is as great and as secure as by American constitutions it ought to be.* Its quality and extent is to be measured *after* a careful ascertainment of *the law*—especially the law of the *rights* of private citizens;—and not *vice versa.*

In this connection it will not be forgotten that inquiries directed by the United States to European governments some fifteen years ago resulted in showing that in *France, Prussia, Austria, Italy, Belgium, The Netherlands, Denmark, Sweden, Norway, Portugal,* and perhaps in all others except *Russia and Turkey,* the state is amenable to justice in its own courts, just as private persons are. (*Report, H. R. No.* 134, 2*d sess.*, 43*d Cong.*, *Brown v. U. S.*, 5 *C. Clms.*, 571.) This therefore may be pronounced to be *jus gentium* amongst the the great powers of Christendom. The *dignity* of such a course cannot well be questioned in any sense of that word. On the one hand it is concurrent action by societies as proud and sensitive as the world has known; and, upon the other hand, how can public dignity go farther than in originally anticipating, and providing against, those recurring accidents to public equanimity which attend all prolonged political existence, and pronouncing once for all, that questions of liability upon the part of the public for alleged violations of

private right shall be settled by that organ of society which is best equipped and secured against casual perturbations in public temper.

The complainant here therefore is secure against any charge that the present action involves an assault upon the dignity of the State of North Carolina.

It is indeed a high compliment to that State to suggest, as the bringing of this suit necessarily does, first, that the common law (which for such matters as it includes represents the best inspiration of that race of men which laid the foundation of American society, and which has always greatly preponderated in North Carolina) renders Government amenable in the ordinary courts to private persons for breaches of contract; and that thereupon, by adopting the Constitution of the United States, the people of North Carolina provided with regard to all contracts which thereafter during accidental times of excitement it might *by law impair*, it would specially submit itself to the action of those of *its own courts* which were at the same time courts of the other States, *the national tribunals*. Surely it is not in regard to wise forethought or high tone that such action suffers in comparison with that suggested by an entry upon the record in the present case (p. 12, top), viz., that in 1789 the State intended in this respect to renounce the common law, and to abandon itself upon all future exigencies to the particular temper of the moment, and authorize its officers from time to time to declare whether it will or will not "consent to be a party defendant" to this or that particular case.

A preliminary sketch of the course of argument in the present brief may be presented as follows:

As is familiarly known, the earliest step at common law in bringing an ordinary suit *in contract*, [the only form of

action necessary to consider as regards governments,] was *an application to the King for a remedy*, which *remedy* soon came to be regarded as meaning the issue of an *original writ* and what would follow thereupon either *in pais* or in court. That writ was in substance no more than a method of shifting the execution of justice from the greatly overladen hands of the King to those of some sheriff and judge. It was in form a direction to a sheriff to *command* the alleged violator of contract to *render* the money, and *unless he do*, then to *summon* him into court to shew *wherefore*. Tidd's Form for the King's Bench is, substantially: "GEORGE *the Third, &c., To the Sheriff, &c.:* COMMAND *C. D., &c., that justly and without delay he render to A. B. the sum, &c., which he owes, as it is said; and unless he shall do so, &c., then summon, &c., C. D., that he be before us on —, wheresoever we shall then be in England, to shew wherefore he hath not done it, &c.*" (Pract. Forms, 44.) This paper evidently proceeded upon the theory that if the sheriff should make known to "C. D." *in pais* the will of the King upon the transaction, as this to him had been stated by "A. B.," or, in the words of the writ, "*as is said*," there were chances that the difficulty would be remedied *there;* and that only in case this method should fail was the writ to become a foundation for a suit *in court;* in which latter event it became also *a commission from the King to authorize some judge to hear the case.*

The form of an *original writ* was therefore inapplicable where remedy was desired upon a contract broken by the King himself; for in the first place it was *folly for the King to direct another to command the King;* and, secondly, it was an *an indecency that a sheriff should command the King in pais.* But it is to be observed that the conclusion from this objection was not pressed beyond the strict logic of the situation; it was not said that therefore the King should go free of the law, but only that proceedings against him should be exclusive of the offensive incident. In the result it was concluded that the direction to the sheriff to *command* the

King should be omitted as well as the direction to summon the King into court—and that as the *application* to the King referred to in the "as it is said," of the original writ informed him personally of the claim, all that was needed, in case he chose not to pay, but to be *acquitted* otherwise, was something to supply that effect of the original writ which remained after the *command in pais* and *summons* were taken away—that is, the *commission to some judge to hear and decide the case.* This was effected by an endorsement by the King upon the application. It will be seen that this *endorsed application* in the latter instance corresponds with the *application and original writ* in ordinary cases; the superfluous *summons* and superfluous and indecent *command* for action in *pais* in the latter paper being omitted. A *petition of right* (to recur to technical names) is therefore not abnormal; further than that it is a proceeding against the only person in the community to whom *ordinary* proceedings at common law, now antiquated both in England and America, did not apply. It is indeed in strict accordance with *the norm* or fundamental principles of common law procedure. Upon its face it is only what in botanical language might be called an aborted procedure of the ordinary sort, just as all suits against governments must be *aborted* at the point of *execution.* And there is no more of *bene placitum* and no less of *debitum justitiæ* in what the King does about such proceedings against himself than about those against "*Nokes*" or "*Stradling*" or "*C. D.*"

This is what, upon the whole, will be attempted to be shown in the present brief.

In discussing the case thus generally set forth the following points will be submitted:

1. *By the common law the English Crown is obliged at the instance of a subject or an alien friend, to refer to the regular courts for hearing and determination whatever issues upon rights*

of property may have been raised on behalf of such parties by its own act, in case these issues would have been so referable if raised by act of a private person.

2. *The forms by which creditors of the Crown are referred to courts of justice, as above, correspond substantially with those of a like reference in cases betwixt subjects.*

3. *By passing a law which impairs the obligation of a contract of its own, or by depriving the other party of his property therein without due process, a State becomes subject to the judicial power of the United States for whatever relief judicial power ordinarily exerts to establish and give effect to violated contracts.*

4. *The act of* 1875, *ch.* 137, *investing circuit courts with jurisdiction over all "suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and arising under the Constitution or laws of the United States" (sec.* 1) *has conferred upon these courts judicial power to enforce the obligations of contracts of a State of that value, when impaired by its own laws.*

5. *Inasmuch as laws passed by the State of North Carolina (resolutions of January* 20, 1870; *act of* 1870, *ch.* 71, *March* 8; *act of* 1874, *ch.* 2, 23*d November; and a constitutional amendment adopted in* 1880; *Const., art.* 1, *sec.* 6) *impair obligations of that State created in* 1869 *by issuing the coupons now in suit, and deprive the holders of such coupons of property without due process of law, the opinion of the presiding judge below was correct.*

To take up these points in their order.

I.

By the common law the English Crown is obliged, at the instance of a subject or an alien friend, to refer to the regular courts for hearing and determination whatever issues upon rights of property may have been raised on behalf of such parties by its own act, in case these issues would have been so referable if raised by act of a private person.

Such *instance* is by means of a *petition of right*, by which the suppliant *sues to* the Crown for such an endorsement thereupon as will allow his case a hearing and determination in the regular courts of justice, in the same manner as (at first, *in fact;* and so long as original writs were used, *in theory*,) he would have *sued to* him for process allowing like hearing and determination against a private person, supposing his cause of action had been against the latter, such *favorable endorsement* being at the same time as much *ex debito justitiæ* in the one case as the *original writ* would have been in the other.

The practical operation of that proceeding is such that if the coupons now in suit had been taken from bonds issued in 1869 *by the British Government, and payment thereof had been refused, the Crown would be obliged by the common law, upon application of this citizen of North Carolina, to allow to him the right of a suit in its regular courts against itself to enforce his claim. Von Frantzius's case,* 2 *De Gex and Jones,* 126. *See post, App.*

If the common law be otherwise in America the general belief that our citizens are in matters of right more upon an equality with their own governments than English subjects (or indeed than such *citizens* themselves) are with the English Crown, may require revision.

Inasmuch as the course of the present argument will not require any further reference to the *details* of the proceeding by petition of right than are to be found in 3d Blackstone, ch. 17, and in short passages to be quoted hereinafter from other authors, the COURT is referred for a general sketch of such details to the opinion of Justice Iredell in Chisholm's case (2 Dallas, 419); and more particularly to that of the court in The Life-Boats case, 11 Allen, 157.

The assertion conveyed in the word "obliged" in the above *point* is understood to be of the essence in this conten-

tion. It is one to be made good, of course, as a matter of substance, and not of bare name or form. If the force be applied by the law to the Crown through the medium of a *velvet touch* it is no matter, so it be really compulsive.

CHITTY *tells us* (*Prerogative, p.* 345): "*It is the very essence of the 'petition' (of right) that it should contain nothing of a mandatory nature. The petition is, however, substantially as well as nominally a petition of right, as the prayer of it is grantable ex debito justitiæ; and Magna Charta says, Nulli ven demus, nulli negabimus aut differemus justitiam vel rectum.*"

The substance of this is, of course, that the compulsion involved in the application is none the less real, because rules of pleading in that connection forbid a suppliant when addressing the King to employ language of command. Indeed, applicants even for Original writs did not use such language. The above expression *ex debito* (or *merito*) *justitiæ* refers to the obligation to *justice* imposed upon the Crown by the common law, of which common law Magna Charta is merely *declaratory*, and it is commonly used by English lawyers to denote that the duty of issuing certain writs is a duty *in law*, and not a mere matter of favor. "Which writs [original] the King *ex merito justitiæ* in due time ought to grant, for the King himself, by the Great Charter, is presumed in law to sit in court and say,—*nulli vendemus, nulli negabimus aut differemus justitiam.*" 2 Inst., 269. See also 2 Inst., 40, 237; 3 Inst., 31; 4 Inst., 21; 3 Black., 49.

Inasmuch as (borrowing from the civil law,) *justitia* was commonly defined in the Latin ages of the common law as *suum cuique tribuere*, whatever *means* under the forms of law was necessary to that end was *debitum justitiæ*, being an indispensable incident to this prime object of society. *Therefore no one within such society could withhold or obstruct it.* The word contains an idea of the same nature as that in the word *rectum* associated with it in Magna Charta. These

words are often said to be synonymous, although Coke makes a sort of distinction betwixt them (2d Inst., 56).

That a debt by the Crown creates a *right of property* is an elementary proposition which has been conceded even by courts which did not deny to the Crown probable immunity from suit thereupon; as, for instance, in Comegys *vs.* Vasse, 1st Pet., 193; Milnor *vs.* Metz, 16 *id.*, 221; Erwin's case, 97 U. S., 392: Phelps against McDonald, 99 U. S., 298, and Bachman *vs.* Lawson, 109 U. S., 659.

If a debt due by the Crown to a subject created a *right* in the latter, it is difficult to escape Chitty's conclusion upon Magna Charta.

The same conclusion is reached and briefly stated by Bowyer, (Constitutional Law of England, p. 141), and by Broom, (Constitutional Law, p. 509).

What is meant by "*denying justice or right to no one*" may be gathered from the forms of petition of right, the substantial portions of the pleadings therein being "the voice of the common law," equally with those of other pleadings. From these forms in the books of *Entries* it appears that the Crown grants the right in question, (1) by giving to the petitioner a hearing in court; and, if upon such hearing he succeeds, then (2) by giving effect to the judgment. A hearing in court may, indeed, be all the *right* to which the petitioner is entitled, as an adverse judgment there will show conclusively that he had no cause of action. In the meantime such hearing is of itself a substantial *right*, the enjoyment of which gives satisfaction to all persons accustomed to the common law. Three out of the four forms in the *Entries* of *Coke* and *Rastell* ask formally for both of these rights. For instance, a petition to James I, in the nature of a writ of right of advowson, after stating the case at length, concludes: "All and singular of which matters, and that his right is such, the same suppliant is prepared to verify by such ways

and means as are suitable; wherefore, may it please your Majesty graciously to consider the premises and to order in this respect RIGHT and JUSTICE, *and likewise, upon the due and lawful trial of the right and title of the same your suppliant, restoration in these respects*, to be done to him, because of your zeal for justice and sense of love." (Coke, p. 420.)

Upon the question of the probable connection of these forms of petition with the above words quoted by Chitty from Magna Charta, a lawyer may think it not idle to observe that probably the juxtaposition of *justitia* and *rectum* in the latter is retained in the former *ex industria*, by way of suggestion that the petitioner desired *the very thing* (*terminis terminantibus*, as Coke would say,) that the King *by Magna Charta had bound himself to allow.*

The form is the same in a petition for dower to Queen Elizabeth (Coke, p. 424), and in one to Henry VIII, to recover land (Rastell, p. 461). In a petition to Henry VII for land the conclusion is the same, omitting what is italicized above (Coke, p. 429). This last form, of course, treats the hearing in court as the principal right to be granted by the King (as indeed it is), the result of such hearing apparently being regarded as an *incident* necessarily to follow. And so does the petition in De Bode's case, 8 Q. B., p. 225.

Again, at that point in his Commentaries where BLACKSTONE treats particularly of remedies against the Crown, after saying that the necessary and fundamental principle of the English constitution, *that the King can do no wrong*, means only (1) that whatever may be amiss in the conduct of public affairs is not chargeable personally on him, and (2) that the prerogative of the Crown extends not to do any injury, he proceeds as follows:

"*Whenever, therefore, it happens that by misinformation or inadvertence the Crown has been induced to invade the private*

rights of any of its subjects, though no action will lie against the Sovereign (for who shall command the King?), yet the law hath furnished the subject with a decent and respectful mode of removing that invasion by informing the King of the true state of the matter in dispute; and, as it presumes that to know of any injury and to redress it are inseparable in the royal breast, IT [*our capitals*] *then issues, as, of course, in the King's own name, his orders to his judges to do justice to the person aggrieved.*" (*Book* 3, *p.* 255.)

Here again it will be seen that we have the "decent and respectful" manner of the presence chamber united to an absolute allowance to the subject of an effective remedy. The clear purport of the passage is that if any subject who has a right of property against the King presents the case to him in respectful language THE LAW will thereupon intervene and issue under the King's name his orders to his judges to do justice. The emphasis upon the word IT, in the expression "it then issues as of course," needs no comment. It is plain thereby that the remedy for the subject by a suit *in court* against the Crown upon rights of contract, like ordinary remedies of similar sort against a fellow-subject, is *in the hands of himself and the law*, unaffected by any discretion in the King other than that which the *law presumes* "*as of course;*" in other words, that discretion which Coke says is only *discernere per legem quid sit justum.* (2 Inst., 56.)

The circumstance that Petition of Right is always spoken of in the books as a "*remedy*" makes of itself a strong presumption that the proceeding operates irrespective of the discretion of the King. "*Petition,*" *says Staunforde* (*chap.* 22), "*is all the remedy the subject hath when the King seizeth his land or taketh away his goods from him, having no title by the order of his laws so to do, in which case the subject for his remedy is driven to sue unto* [*the very phrase, by the way, employed in regard to applications for original writs*] *his sovereign lord by way of petition only, for other remedy hath he not,*" &c. The

word " remedy " is employed here three times within a few lines; and without elaborating the point, it seems certain that this does not signify a mere impotent *dunning* of one's debtor, either for a suit in court or for payment.

In other words *petition* in this connection has a technical meaning, and is not used in the sense immortalized by PATRICK HENRY.

That the access to judge and jury in this case is by the door of *a petition endorsed*, and not by that of an *original writ*, is a matter to be discussed under the second topic of this brief; and will then be seen to be wholly immaterial as regards the right prayed for in the petition,—the right, that is, as claimed in the Entries, to show and prove the case "*viis et modis quibus convenit.*"

Another authority upon this topic is DANIEL, in his Chancery Pleading and Practice (ch. 84, sec. 2, ed. 1846); where, after telling the practitioner that a bill will not in general lie against the Queen, and "that the party claiming must apply for relief to the Queen herself by petition of right," he proceeds thus:

"*A petition of right to the Queen is in the nature of an action against a subject, in which the petitioner sets out his right to that which is demanded by him, and prays the Queen to do him right and justice, and, upon a due, lawful trial of his right and title, to make him restitution. It is called a petition of right because the Queen is bound of right to answer it, and to let the matter therein be determined in a legal way, in like manner as cases between subject and subject.*"

In the editions of this work, published after the *Petition of Right Act* (23 and 24 Vict., ch. 34) had been passed, the whole connection in which the above passage appears has been rewritten by the editors, and for the last sentence above has been substituted (vol. 1, p. 131, ed. 1871) one taken from the

judgment (A. D. 1850) in Moncton *vs.* Milnes (2 McN. & Gord., 412), where, upon a question whether petitioners, upon coming before the court, are not as much bound by previous adjudications upon the subject-matter of their alleged right as they would have been in case the suit had been one against a fellow-subject, Lord Cottenham said:

"The proceeding by petition of right exists only for the purpose of reconciling the dignity of the Crown and the rights of the subject, and to protect the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights."

And thereupon he declared the petitioners bound by such previous adjudications.

That edition of Daniel then proceeds as follows (p. 132):

"According to the practice before the passing of the act the petition was to be determined in chancery, and the method was this: The petition was presented to the Queen, who subscribed it with these words: '*Soit droit fait al partie*'—*i. e.*, 'Let right be done to the party;' and thereupon it was delivered to the chancellor '*in forma juris exequend*'—*i. e.*, to be executed according to law," &c.

The language thus adopted by recent editors instead of that of the distinguished *author* of the work, does not vary the substance of the latter as to the point now in question; but, perhaps more strictly according to the methods of a book of its class, substitutes for an express statement of a principle that of the actual *practice*, a *practice* which indicates the same principle, viz., that upon the presentation of the petition to the Queen *she subscribed it with words of assent*, the whole change from *original writ* to *petition* being for the purpose, as had just been said, of saving *the Queen's dignity* without altering *the subject's* RIGHT. Keeping in mind that the subject's right at common law, as regards disputed property, is ordinarily, amongst other things, *right to be heard in court*, the force of Lord Cottenham's statement that his right re-

mains *unaltered* in case of injury by the Crown plainly appears, as also the propriety of the *matter-of-course* way in which the Queen, upon presentation of the petition, *subscribes her assent.* The course of *practice*, &c., thus detailed agrees with what Blackstone, Chitty, and Daniel himself had previously stated to be the presumption and rule of law as to the action of the Crown.

MANNING, (*Exchequer Practice*, p. 84, ed. 1827) lays down the law to the same effect, as follows:

"*By the law of England no* personal *wrong can, for obvious reasons, be imputed to the sovereign; but when the* property *of the subject is invaded or withheld the prerogative does not prevent the injured party from obtaining restoration or payment. When, however, a right is sought to be established against the Crown itself, it will be absurd as well as indecent to adopt the mandatory forms of common process. The course, therefore, prescribed by the common law is to address a petition to the King in one of his courts of record, praying that the conflicting claims of the Crown and the petitioner may be duly examined. As the prayer of the petition is grantable* ex debito justitiæ, *it is called a petition of right, and is in the nature of an action against the King or of a writ of right for the party, though chattels, real or personal debts, or unliquidated damages may be recovered under it.*"

The weight of the concurring opinions of four such masters of their profession as Blackstone, Chitty, Daniel, and Manning upon a point of law which, at the time, was the very matter which they had in hand, cannot easily be overestimated.

That the above plain words of Blackstone should have remained unchanged through so many editions, after having been submitted to the eyes of probably hundreds of thousands of common-law lawyers, is a circumstance very remarkable indeed, unless they be not only accurate, but even beyond reasonable debate. One hundred years after its first publication the last sentence in the above extract, that which maintains the very stress of the present contention, was quoted by this COURT, from what may have been a *fiftieth*

edition [Eng. and Am.] of the Commentaries, in order to show that a British subject could maintain a suit against the United States in the Court of Claims. (O'Keefe's case, 11 Wall., 178.)

The reason assigned by English lawyers for the immunity of the Crown from suit is pertinent only to suits begun by WRIT. Inasmuch as original writs contain a direction from the King to the sheriff to *command* the defendant to do a certain thing *in pais*, it was regarded as an *indecency*, and therefore an impossibility, for the King to be such "defendant;" as it was also an *absurdity* that the King should have directed such command to be given to *himself*. Thereupon Blackstone, following Finch, asks, as above, "*Who shall command the King?*" And Comyn (Prerog., D, 78), quoting Coke (4 Rep., 54, *a*), says, "*The King cannot command himself;*" that reason having probably been borrowed from Brooke (2, 130, *b*), who had appended to a noted statement by Justice Wilby of the time of Edward the Third (as to the existence of a writ, beginning, "*Præcipe Henrico regi Angliæ*, &c.) the words "*Quære de tiel briefe, car videtur quod nunquam fuit lex, car le roi ne poet escrier ne command luymesme.*"

Lord Cottenham's account of the same matter, three hundred years after Brooke (2 McN. and Gord., 412, *above*), is to like effect: "The proceeding by *petition of right* exists only for the purpose of reconciling the dignity of the Crown to the rights of the subject." Lord Cottenham does not contrast the *rights* of the Crown with the *rights* of the subject, but its *dignity*—the whole progress of the common law having in the meantime been to indicate that *dignity* even under a monarchy is of an order of things very inferior to that of *right*.

It may, therefore, be submitted that the "broader" reason for this immunity, which has been intimated in very high quarters, may go too far, viz., *the impropriety of submitting to*

judicial tribunals control of the sovereign's means of carrying on the government in war and peace,—his money in his treasury.

That reason seems to be not pertinent even to suits *by writ* when brought for *land* or *specific personal property*. In this respect it is, therefore, more narrow than is required to account for the existing immunity of the King from *all suits by writ*. Nor is it pertinent to suits of any sort for *money*, inasmuch as the satisfaction of these must await an appropriation therefor by the Legislature, a thing which was no more *a matter of course* when the King was mainly himself that *Legislature* than in later days. At most it contains a suggestion why the judicial power should not issue *final process* upon judgments against the Crown, and does not forbid resort by the subject to that power in order in good time to investigate and settle such questions of law and fact as may obscure his right, or to adjudge that right valid and render its memorials permanent. In Great Britain, and probably in all societies which have healthy respect for judicial power, *such hearing and determination* will in no long time lead to satisfaction of the judgment by the political department, *as of course, and without embarrassment.* This is the theory which underlies the existence of our own Court of Claims—a theory which in practice has given such satisfaction to the public that Congress has very recently been called upon to extend its operation, and thereupon, in great extent, to make methods for securing justice against the United States in their own ordinary tribunals, convenient to the residence of all citizens. (Act of 1887, ch. 359; 24 Stats., 359.)

So far, therefore, it appears that by incurring debt to a subject at common law the Crown not only creates *a right* on behalf of the latter, but such a right as is necessarily attended by *a remedy* in court; thus making the transaction a full illustration of the maxim, *Ubi jus ibi remedium.* This must therefore be true of all political societies which recognize the Three Great Departments of government, and which,

as to right and remedy, are controlled by the common law. For these also, debts which are lawfully contracted by the Executive, are *ipso facto* clothed with suitable remedies to be administered by the Judiciary. The circumstance that in England the person who as Executive contracts debt is the same who as a part of the Legislative power had previously authorized it, and who also as fountain of Justice subsequently, by writ or otherwise, opens the doors of courts for remedy, can make no difference as to *right* and *remedy* in societies where the opening of these doors is intrusted to the courts themselves: in societies—that is, none of the writs in which are *prerogative* writs, or more than other "ordinary proceedings." Hartman *v.* Greenhow, 102 U. S., p. 675; Kendall's case, 12 Pet., 615. Application for process by which to begin an action is application for the exercise of judicial power, and this power begins to be exercised by the issue of such process. The *suit* itself *begins* at such issue. That in England a political personage exists who, whilst being Chief Executive, retains also by common law certain of those judicial functions which originally were wholly his own, does not in theory render an exercise of such functions against such Executive more precarious than if such personage were resolved into different persons, one of them wholly *executive* and the other wholly *judicial* in character. In point of principle it is in either case one person acting upon another person—the Judiciary upon the Executive—and that as plainly, to a lawyer at all events, as where in a kindred society the judiciary powers are by fundamental law delegated to other persons than they who hold those which are *executive*. In either case the issue of *original* process is equally *the first step* in the application of that virtue or power which one organ of society alone, in societies recognizing the three departments, can exert upon questions of debt or no debt—*i. e.*, a state of things created by that other organ which in general has the exclusive power to incur debt. That in America observation of human

nature has led to the delegation of these fundamental powers of government to distinct persons may well be asserted to have done away *here* with those obscurities that have led to some supposition that a debt-incurring executive *there* is not controllable by a debt-enforcing judiciary, but retains a *bene placitum* as to his subjection to the remedy, after his *bene placitum* as to creating the right has ceased. And if, unhappily, anything about our constitutions be thought to render that supposition sound for matters within America [extending the same also to the *legislative* department], the logical foundation thereof must be an assumption that at the era of the Revolution it was considered that a more perfect distribution betwixt different persons of the social powers of *incurring, and of enforcing, debt,* has been accompanied by the extraordinary consequence that the latter power, which in certain cases in England may in bad times have been somewhat precarious in point of operation because of the *personal* element due to the union of both powers in the same hand, has in the same class of cases here been deprived of all compulsory operation, although that injurious *personal* element has disappeared! That conclusion would consecrate the caprice of some royal Charles or Henry as more worthy of perpetuation amongst free institutions than those settled principles of the common law whose effect that caprice had in fact perhaps sometimes baffled by those familar means by which great authority or great wealth, even in *untitled* defendants, everywhere often obstructs justice.

Until such conclusion shall have been announced it may be allowable to believe that the command (or, as Blackstone might say, the *ever-effective* "persuasion") of the common law in England to the person who issues the original process required to warrant suit against the Crown [viz., in substance following Magna Charta—"*Ne negetis ulli,*" &c.] is repeated by it here to the persons in like manner authorized, even as against the Government; and that, inasmuch as the duty so to issue is not in either country one of *discretion*, but (the

mere *dignity* of its doer aside) as much a ministerial act as it is for suits against private persons, questions as to methods of enforcing the command in the one country need not be questions in the other; and, more particularly, that if there should be suggestions going to show that no method of specific enforcement of such duty exists in the one country, if this be owing to peculiarities in its political constitution which do not concern the nature of the duty in question, and that have been discarded in the other country; such suggestions would as regards that other country be without bearing or consequence of any sort. If it be not the character of the *function* but that of the *functionary* which creates the doubt, *cadit quæstio* in all places where, upon grounds of public policy, a functionary of that character does not exist. *Ex parte* Virginia, 100 U. S., 348. Therefore, if the common-law *petition of right exists*, as Lord Cottenham said, *only* to reconcile royal dignity (to which *ordinary* original process is offensive,) with private right (imperatively requiring original process *of some sort*); and if there be no such "dignity" in an American Government, it follows that *right* may be enforced against an American Government by ordinary process; so that in America any statute which by general words confers jurisdiction over such breaches of contract as a government may commit, to a court authorized to issue ordinary process, does thereby, upon such breach, allow of a suit thereon against such government.

But to continue an examination of the authorities:

In the much-quoted Bankers' case, 14 St. Trials, 1 (A. D. 1700), the only question was (p. 104) whether a certain short method in the court of exchequer (said by Holt to be a *monstrans de droit*, but doubted by Somers) could be used to coerce satisfaction of a debt (that had been incurred by Charles II, and charged by certain *assignments* upon current

revenue,) out of "revenue in the receipt of the exchequer." The case and arguments did not at all concern petition of right. In the Exchequer judgment was rendered for the plaintiff: (See also Jenkins, Cent., 1, Case 21.) Upon writ of error to the Exchequer chamber that judgment was approved by "much the greater part" of the judges, (p. 105), but inasmuch as the opinion of the Lord Keeper was otherwise, and in law was paramount, it was reversed. Upon further appeal to the House of Lords this reversal was itself reversed.

In the end, therefore, the plaintiff recovered judgment on the special remedy upon which he had insisted. However, an act of Parliament—in England *omnipotent* over all matters, including contracts, public or private, and also needed for *an appropriation*—made a *composition* of the claim at one-half, which was paid (p. 4);—a *composition* probably attributable to the circumstance that the bankers had taken an "unconscionable profit" in the security obtained from the King (pp. 44–'5).

This is the latest case, perhaps, which turns upon the irregular methods (samples of which—such as "pledging his jewels, or the customs, or occasionally the persons of his friends,"—are given in 2d Stubbs' Const. Hist., 555, 557, 558, ed. 1883) by which, before the revolution of 1688, English kings endeavored to avoid the effect of their bad personal credit. In consequence of the system of *appropriations* that was introduced into revenue statutes at that period, *tallies* upon collectors, and other methods for giving Crown creditors proceedings *in rem*, as it were, in place of the King's personal credit, disappeared, and this circumstance, as is submitted, furnishes the true reason why *the judgment* by the House of Lords in the Bankers' case has not since been often cited as authority.

Of course, that case at no time had any direct bearing upon *petition of right*. The very clear and profound opinion of the Lord Keeper is, however, regarded as having incidentally settled the question that that proceeding is a remedy

against the Crown for *debt*, as well as for *disseisins*. (Thomas *vs.* The Queen (L. R.) 10 Q. B., 31.)

The proceedings in Parliament upon the celebrated "Petition of Right" (3 St. Trials, pp. 60 to 230) are also pertinent in this connection. That was a petition for *political right*, it is true; and therefore the practical result of the assenting endorsement by the King became operative *per se* upon the right claimed. The prayer of the petition did not ask for action *in court*, as in petitions for rights of property; but the proceeding (thereby indicating its force) was quite as compulsory upon the King, as a petition for a right of property to be enforced in court. The "*soit droit fait*," or equivalent endorsement, was *ex debito justitiæ;* and in either sort of petition the King thereby performed the whole of his constitutional duty. It was for that reason that this form of proceeding had there been resorted to, viz., because it was in its nature *compulsory;* for, during the early part of the debate in the Commons, it had been proposed to make use, *first*, of RESOLUTIONS (p. 83), and *subsequently* (p. 175) of a BILL for the purpose of confirming the rights in question; but during the discussion upon the *bill* Sir Edward Coke, who was leading on the side of liberty and law, at the close of one of his speeches said: "Let us put up a PETITION OF RIGHT." P. 188 (May 6th).

When this petition reached the Lords it was amended by adding a clause *saving* the "sovereign power" of the King (p. 193). Upon its return in this form to the Commons, Coke, with great force, opposed its acceptance, saying: "This is *magnum in parvo* that is propounded to be the conclusion of our petition. It is a matter of great weight, and, to speak plainly, it will overthrow all our petition; it trenches to all parts of it; it flies at *loans* and at the *oath*, and at *imprisonment* and *billeting of soldiers* [these making the four subject-matters of the paper]. This turns all about again. Look

into the petitions of former times! They never petition wherein there was a saving of the King's sovereignty. I know that *prerogative* is part of the law, but *sovereign power* is no parliamentary word. * * * Magna Charta is such a fellow that he will have no sovereign. [May not American *Constitutions* also be such "*fellows*"?] I wonder that 'sovereign' was not in Magna Charta or in the confirmations of it." (p. 193.) Subsequently the Lords agreed to the petition as originally drafted, and when presented to the King he at first gave an equivocal reply (June 3), p. 224. This having been rejected by the Commons—after significant words by Coke, Selden, and others, and a more significant "*silence in the House for awhile*," upon the 7th of June the King returned the formal answer appropriate to petitions of rights of all sorts: "*Soit droit fait comme il est desiré par la petition*" (p. 230).

Coke's view in substituting a petition of right for an ordinary bill [the latter also, according to English forms, having then been as is well known a *petition* to the King, although not one *of right*,—a petition, that is, *for an enactment;* 1 Spence, 80, 269, 272, n. *g.*], appears to have been that in regard to the latter the King, as a part of the legislature, *had a discretion* whether to utter the positive, *Le roi le veut;* or the negative, *Le roi s'avisera;* whereas in a petition based upon *right* there was but one answer, viz., *assent*, subtantially as above. To the latter there could be neither a negative reply nor a refusal to reply at all. In effect therefore Coke's advice to the Commons was to adopt a proceeding that would (in a certain sense, admissible in a society so constructed,) remove their application for redress from before the King considered as part of the Legislature, and transfer it to his presence in the character of head of the Judiciary, and therefore called upon to pronounce on a question of *right*, and not on a matter of mere expedience. The conclusion follows that Coke, Selden, Pym, Noy, and the other profound lawyers in the Commons who assisted in this great

constitutional proceeding ("*a prodigious weight of legal ability:*" Hallam, C. H., 390, n. *c*) must have agreed with Blackstone, Chitty, Daniel, and Manning in the opinion that petitions stating *rights of property* against the Crown, which stand upon like reason with those for *political rights*, are necessarily attended by an affirmative answer. RIGHT *was to be denied by the King to no one;* the method of applying for and obtaining it in each case depending, of course, upon the sort of right demanded.

The case of Ashby *vs.* White, as reported in 14 St. Trials, 695 (A. D. 1704–'5), is also to be cited. There, as is well known, the plaintiff sued for damages on account of the rejection of his vote for burgess in Parliament. In the King's Bench it was held (Holt dissenting) that an action did not lie for such rejection. Thereupon the plaintiff applied for a writ of error to the House of Lords. This application occasioned much excitement in the House of Commons, which claimed that no court of justice had the power to pass upon the right of voting for members of that House, that being exclusively a function of its own; and was particularly offended by the suggestion that such question might be passed upon *even by the co-ordinate House of Parliament, in its character as a court of error.*

As a relic of the times when the King sat in person and gave judgment in the Court of King's Bench, the common law forbade a writ of error from thence to the House of Lords unless by a special allowance of the King, to be had by petition of right. (Jenkins, Cent., 1, Case 41; 4 Inst., 21.) Thereupon, pending Ashby's petition for such writ, the Commons addressed Queen Anne (p. 806) to reject it. *Per contra*, the Lords resolved "That a writ of error is not a writ of grace, but of right, and ought not to be denied to the subject when duly applied for (though at the request of either House of Parliament), the denial thereof being an obstruc-

tion to public justice, contrary to Magna Charta." Upon this the Queen referred to the judges the question whether she was bound to grant the writ of error. After debate ten of the twelve judges certified (p. 861): "We are humbly of opinion that a writ of error in this case ought to be granted of right and not of grace, but we give no opinion whether a writ of error does lie in this case, because it is proper to be determined in Parliament, where the writ of error and record are returned and certified" [thus drawing, aptly and clearly, the distinction between the absolute right *to be heard in court*, and a contingent right to the thing claimed as the fruits of such hearing]. Accordingly the Queen replied to the address of the Lords (p. 878) that she would have granted the writ but for her determination, upon public reasons, to prorogue Parliament. [Subsequently, as is well known, the writ was granted, and the judgment below reversed (1 Brown, P. C. 45.)]

Inasmuch as Somers was very active in this matter upon the side of the Lords, and drew the resolutions one of which has just been given (4 Camp. Chanc., 166, &c.), the case of Ashby *vs.* White shows that Holt and Somers had not differed in the Bankers' case as to the *compulsory* nature of the proceeding by petition of right. Upon the affirmative side of this question, therefore, these two justly celebrated names are to be added with those arrayed on the side of the petition of 1628, to the names of those venerable masters of the living bench and bar in common-law countries, first above cited.

In the parliamentary proceedings of 1628, as well as in Ashby *vs.* White, a principal question settled involved the *quality* and *force* of the proceedings known as *petition of right*. If that proceeding bound the Crown to assent in both of these cases, it must have been because of an *innate obligatory quality* therein which might be reckoned upon for one sort of *right* as well as for another; *ex. gr.*, in case of a *dis-*

seisin or *debt*, as well as in that of *need of a writ of error* or *grievance arising from imprisonment, or from taxations contrary to statute*—a quality "obligatory" in essence, no matter whether courtly metaphysics be right in its *juris et de jure* "presumptions" upon the invariable state of the King's *free will* after he hears the petition, or whether that will were actually controlled by action *in invitum*.

Petition of right was also formerly employed in England to obtain the Crown's permission for proceedings to avoid its charters and letters patent wherever these conflicted with private right—a permission which may plainly be seen to have also been *ex debito justitiæ*.

Smith *vs.* Upton, 6 Man. & Gr., 251.

The two centuries which elapsed from Coke to Chitty form a high and palmy period for the common law within England. After the above showing upon the deliberate opinions of the sages of that time, it is not a matter of importance here to refer to lawyers who lived earlier. The relation of the Crown to the law, viz., whether *Rex* was the author of *Lex*, or *Lex* the author of *Rex*, was in England until within two centuries past in great measure a question of party politics. Out of the long and violent fermentation thereupon has at length come to be generally recognized the true quality of the *common law*, as, although no despiser of dignities, nevertheless the strenuous and successful assertor of private right against all challengers.

It seems to be universally admitted that American liberty and order is much indebted, in point of principle, to the class of English lawyers of which Coke, Pym, Somers and Holt are illustrious members. And equally, it will be admitted to be matter for grave apprehension if the old notion of a REX ABOVE LEX, after having at the end of centuries of struggle been outlawed in England, shall be revived in

America *in favor of any person whatever*, whether natural or political,—a State or a Nation.

I have not been able to find in *Brooke* or *Fitzherbert* or *Staundford* anything for or against the above doctrine of Blackstone. Indeed, it was improbable *a priori* that the two former books, being merely notes of decisions in courts, should contain any such matter; because before a petition of right can reach a court, the King must already have assented so to refer it; and, therefore, to make a question, there as to his having been *obliged* to give that assent would be idle as well as indecent.

If *Bracton* contradicted Blackstone, it might be necessary to consider the comparative weight of an opinion upon common law in a book of the 13th century which entertains in general such strong views of the power of the English King as does the former—one whose pages also *mingle* common law and civil law without distinction—with that in a book written under such great advantage as was *Blackstone*, the views of which, as above quoted (when its author's political principles are considered), might be claimed as of the nature of a *concession*. But it is not necessary here to raise any doubt upon the merits of Bracton. Considering that he was a contemporary of Magna Charta, at least as contained in 9 Henry III, and also of the very birth of the common law—an event commonly referred to the same reign, or thereabouts—Bracton is entitled here to the credit of having placed *Lex*, upon the whole, above *Rex*, and of qualifying his own statement that the King could not be coerced by legal proceedings, at one place, by the expression, "*nisi sit qui dicat quod universitas regni et baronagium suum hoc facere debeat, et possit*, IN CURIA IPSIUS REGIS" (171, *b*); and at another by the like expression, "*Rex autem habet superiorem, scil., Deum: item Legem, per quam factus est rex; item, Curiam suam; videlicet, Comites Barones que; quia Comites dicuntur quasi socii regis*, ET QUI HABET SOCIUM HABET MAGISTRUM," &c. (24 *a*). Certainly these expressions are vague;

but what else could be expected in that age? Bracton was necessarily surrounded by what may be termed the mere *protoplasm* of the common law. If he had been told that the period would come by mere development of that law, when out of that *universitas* and those *socii*, about whose power and duty to bridle the King in the interest of private right he was speculating, and by means of that "*supplicatio*," of whose coercive effort on the King, except as an appeal to God, he had so poor an opinion (171, *b*), would be evolved a substantial and compulsory remedy, he would probably have turned his informant to the above-quoted passages *as containing a prophecy thereof.*

The Mirror of Justices is also to be cited in this connexion. That little book is clear and emphatic in stating (pp 4, 10, 225, &c.) that the English King in early times was coerceable before the courts, *even by writ*, like his subjects. The authority of *The Mirror* for matters of law,—which, mainly under the auspices of *Reeve* (*History*, &c.), has of late been questioned,—is amply vindicated in the latest edition of that work, in an elaborate note by Mr. Finlayson (Vol. 2, p. 232). Upon the question of that "authority" it is also instructive to remark that *The Mirror* is freely cited (*38 times*) by *Blackstone*, and still more freely cited and quoted by *Coke;* (320 *times* in his 4 Institutes). *Their* reliance upon that book for matters of ancient law bears out Mr. Finlayson's remark that "*It* affords the most valuable illustrations of the legal history of that age [the Saxon], and of the whole intervening period up to the present reign."

I conclude this topic with the remark that the terms *Petition* and *Suppliant*, which occur in these proceedings, convey to lawyers no impression that it is a mere *favor* that is being asked for. The word *Peto*, with its derivatives, Latin and English, was universally employed under the Roman law, and afterwards under the common law, to de-

note a *demand* by the plaintiff in any sort of suit. In the same way *Supplication*, like *Application*, is often used in cases where there can be no pretense that the asking is for a mere favor. Bills and petitions in Chancery are termed *Supplications* by West in his *Symboleography*. See Seaton, Decrees, p. vi. See other illustrations in 2 Stubbs, 279, n. 3; 1 Spence Eq., 80, n. *j*; Hale's Fitzh., 183, &c.; Rolle's Abr., 97 (3). Except as technically employed, the words *plaintiff* and *plaint* are *pathetic*. *Prayers* in chancery are to the same effect:—a reference which reminds me to say that the circumstances that some writers speak of the allowance of a Petition of Rights as a matter of *grace* on the part of the Crown does not determine the point that such grace is not itself a matter of *right;* for it is familiar learning that the whole jurisdiction in chancery is only *of grace* (1 Story Eq. Jur., sec. 44 and n.; 1 Spence, 337, 407; 1 Pom. Eq., sec 33), as the language of the original bill, even in America, still shows; yet a resort to that jurisdiction is at the same time a matter of plain *right*. Although grace is often used in contrast with right, it is not synonymous with *bene placitum;* and whether in any case it be employed as its equivalent is to be determined by the subject-matter and the context. In the mean time it is to be repeated that no matter of private *right* is at common law subject to the *bene placitum* of the King.

[In the appendix to this brief I have inserted notes of some late English cases of Petition of Right.]

II.

The forms by which creditors of the Crown are referred to courts of justice correspond substantially with those of the like reference in cases betwixt subjects.

Petition of Right is sometimes spoken of as if it were a

form of proceeding that in point of principle is entirely unlike those ordinarily in use by litigants in England—*ex. gr.*, that by Original Writ. It is submitted that this assumption is not correct.

The Original Writ was a writ from the King that at first in substance was actually issued by him in person, but soon was necessarily intrusted for issue to the official nearest to him in dignity, and he, in turn, for a like reason to that which had compelled the King to delegate that duty to him, also intrusted it to his own subordinates. The issue of the Original Writ of course presupposed *an application or suit therefor to the King by the plaintiff* (3 Black., 271). The *details* of such application defined the *form* of the writ issued in answer thereto—*i. e.*, whether in *debt*, *trespass*, or other. These applications were oral. The universal term to denote any application to set in motion some function of the King (whether as chief legislator, executive, or justiciary), needed for remedy of what was termed a *grievance* was, as already said, PETITION. This was true whether such grievance were felt by the House of Commons as representative of the people at large, or by some one subject who requested the remedy of a private statute, or were such as had been occasioned by some injury to private right, and therefore needed remedy in court. And so of an application for the exercise of *bene placitum*, in granting pardon or conferring dignity or an office or the like. The application so denoted might set in motion either the justice or the favor of the King. It is therefore implied as having *preceded* the issue of every Original Writ, the latter being only a *second* step in the prosecution of justice. And the ancient models of such writs (see Stephen Pl. App., n. 2) recited such application expressly; instead of merely referring to them by the "*as it is said*" above mentioned.

It is conceivable that, if education had been more common in the time of the early *Henrys* and *Edwards*, a plain-

tiff might have drawn his petition for a writ *in writing*, and that an endorsement thereupon by the King (or afterwards only in the name of the King) or a short paper referring to such petition for details—might have come into use instead of the form which actually did so. The principle, and substantially the form, of such supposed transaction and of that which actually came into use is the same. Each of these would have had the same effect, viz., an opening by the King of the doors of some court to the plaintiff in a certain case.

Accordingly, when the court of chancery was first created, applications for writs intended to become foundations for suits in that court were required to be put *in writing*, and the short writs, *subpœnas*, issued thereupon were rendered *specific* as to the matter which the court was thereby commissioned to hear, by an express reference therein to such application, instead of having this matter specified upon the face of the writ itself, as at common law. As at that time chancery had become the *officina justitiæ*, the application was to the *Chancellor*, just as the application for original writs then was to certain *Masters of Requests*. 2 Inst., 355. This is all matter of mere detail which leaves the principle of the two proceedings plainly the same (1 Dan. Ch. Pr., ch. 8),—the more evidently so in that when the office of Chancellor is vacant original bills—that is, applications for writs of subpœna—are still addressed to the Crown itself. (1 Dan., ed. 1846, p. 408.)

In the same way application to the King for justice against himself is a "petition," a short endorsement upon which opens the courts to the plaintiff for the case to which that endorsement refers, substantially in the same manner as is done in ordinary cases, either by the King's original writ in answer to an oral application or "petition" or by a bill and subpœna.

That the application, or supplication, by petition of right

is made to the King in person, whereas ordinary applications for original process are to his subordinates (the allowance in all cases being equally *ex debito justitiæ*) is explained by the circumstance that the class of cases in which he himself was to be defendant has never been so large as to prevent his personal attention to applications for original process in that. So that the issue of such process in that class is seen to be *a survival* from the time when the King issued all process, and not as sometimes, and perhaps without much consideration, suggested, an abnormal provision of English law. It has long been held that the King has parted with all personal power to issue original writs, including subpœnas, and that, equally, he has parted with all power to *hear and determine* suits of any sort. But, as original writs extend only to suits against subjects, it came to be seen that the King had not delegated the power of opening the courts for suits *against himself*. Consequently the power of opening the courts for this latter sort of suits remained where originally the law had placed *all* such power. The logic of the position seems to have been this: The applicant for justice against the Crown has exhibited a *right* that requires to be *heard and determined; the Crown* cannot do this itself; *the courts* cannot hear and determine in any case unless *commissioned* thereto by the Crown; and the ordinary sort of commission, by original writ, does not apply: THEREFORE *a special commission must be obtained from the Crown which has retained all of that original, universal power of commissioning courts which by usage or otherwise it has not in fact delegated.* Whether the petition and its endorsement *soit droit fait*, are of themselves a complete substitute for the *original writ*, or whether these require also a subsequent *commission* in chancery in order to have that effect, is another matter of mere detail. The application to the King, followed by his reference of the matter to a court, is easily recognized to be strictly in accordance with the old English forms for all suits; and as well, also, with the maxim, *Non potest quis sine*

Brevi agere; Breve being the King's *commission* to his judges, for any particular case.

It is also proper to note that the method of entering court by means of a petition of right is expressly termed an original writ, in Brooke (*Petition Pl.*, 34); and in De Bode's case (2 Phil. Ch., p. 86); and also in the learned note to Smith *vs.* Upton (6 Man. and Gr., 251).

All that was material, however, under this topic of the argument was to show that the proceeding by petition of right is, *even in point of form*, analogous to the ordinary methods of beginning suits, and that it is in his character as the original Fountain of Justice, and by way of mere *survival* from his former vast duties in that character and of the same sort, that the King acts therein. As has already been shown, the application here, as in all other suits, IS AN APPLICATION TO A CHIEF JUSTICIARY FOR REMEDY IN COURT AGAINST A DEBTOR; upon the theory that the former is as little capable of acting therein, with *partiality* towards the latter where he himself is that *debtor* as where he is not; a theory which, however, the law does not extend to the *hearing and determination* of the cases. So far as action in *instituting* suits against the Crown is concerned, the personal element about the Kingship, in view of law, plays no part—the *petition*—upon any matter of contract ordinarily justiciable—being allowed as mechanically, as formerly original writs themselves were.

The division of labor between *Mr. Andrews* and myself renders it superfluous to discuss here the remaining points first above stated. Each of these will, therefore, be dismissed summarily.

III.

By passing a law which impairs the obligation of a contract of its own, or by depriving the other party of his property therein without due process, a State becomes subject to the judicial power of the United States for whatever relief judicial power ordinarily exerts to establish and give effect to violated contracts.

Such law constitutes a *Federal* violation, so to say, of rights of contract or rights of property—that is, of such rights as it is a chief end of judicial power to protect and enforce.

It has been seen that by the common law a State (and the United States as well) is liable to its own judicial tribunals for violations of its contracts. The same common law exacts from States a like liability on account of such violations as are forbidden by the Constitution of the United States. The courts of the United States within the boundary of a State are a part of its own courts. No State has power to change a principle of the common law as regards the persons who are liable to be sued in courts of the United States; in other words, to change a construction in that respect which the common law places upon the Constitution of the United States.

The United States owe protection by their judicial power to all persons in behalf of whom they are not expressly forbidden to exercise such power, against the effect of all violations of their own Constitution and laws which are injurious to the property of such persons.

And the XIth amendment has not changed the rule of the common law as to the liability of States to the judicial power of the United States for their own *Federal* violations of contracts with *their own citizens*, or of the rights of property of such citizens.

IV.

The act of 1875, *ch.* 137, *investing circuit courts with jurisdiction over "all suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and arising under the Constitution or laws of the United States" (sec.* 1) *has thereby conferred upon these courts judicial power to enforce the obligation of contracts of a State of that value when impaired by its own laws.*

This is equally true, of course, of suits for property to such value, where the plaintiff has been deprived of this without due process.

V.

Inasmuch as laws passed by the State of North Carolina [Resolution of Jan. 20, 1870; *Act of* 1870, *ch.* 71, (*March* 8); *Act of* 1874, *ch.* 2, (*Nov.* 23), *and a constitutional amendment adopted in* 1880; *Const., art.* 1, *sec.* 6] *impair obligations of that State created in* 1869 *by issuing the coupons now in suit, and deprive the holders of such coupons of property without due process of law, the opinion of the presiding judge below was correct.*

These laws are given in the record, pages 6 and 7; they speak for themselves.

The law under which the coupons were issued may also be found in the record, pages 2, 3, and 4. It will be seen that the details of that law are like those in the cases of Jumel, 107 U. S., 711, and Hagood *vs.* Southern, 117 U. S., 52.

In those cases it was held that even if by State laws officers charged with the duty of raising the money to satisfy such coupons and bonds might, in the absence of countermand by the State, be coerced so to do, yet whilst such countermand existed they could not be, even although

such countermand went to the heart of the obligation of contract, and was given by a law which upon that account was *unconstitutional.* The view taken by the court was that, although the creditor had an interest in the action of the State officers, yet the command to perform the action was one in which he had no legal interest, and so none in the countermand, and therefore upon that account the latter was not wholly void, but had the effect of communicating to the officers the immunity of the State.

The laws now in question have the same effect. Cases cited in the appendix show that until the period at which the State undertook to refuse payment of these bonds the courts of North Carolina were very liberal in holding such of it officials as were charged with duty towards rights of property in private persons liable to mandamus in case they failed in such duty.

This was in accordance with the strong common-law instinct in happier times there prevailing.

It follows that these laws have not only impaired a contract but also have *effectually* destroyed a remedy. There seems to be no method by which this violation of the Constitution of the United States in respect to a right peculiarly protected by judicial power can be redressed unless by a suit *against the State.* If the common law warrants such suit in any case, it is one especially appropriate here. If it be not warranted it must be because we have in America what do not exist in England, viz., "chartered libertines" as regards *rectum et justitia*—the law not being for citizens here what Coke, in a memorable interview, told James I that it was for subjects in England (12 Rep., 65) *the golden met-wand and measure to try their causes by.*

S. F. PHILLIPS,
For Temple.

APPENDIX.

I.

An act passed 23 and 24 Victoria (ch. 34) has provided a plainer form of proceeding in Petition of right than that at common law, allowing suppliants, however, still to resort to the latter. The statute, however, does not enlarge *the common-law right to this remedy.* A proviso to section 7 is: "Provided always that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this act."

Some recent English cases of Petition of Right are as follows:

The Windsor, &c., Co. *vs.* The Queen (L. R.), 11 Appeal, 607 (1886).

This came before the Privy Council from Canada, and damages were recovered therein for breach of contract betwixt the Canadian government and the suppliant for the use of a certain railway.

The Queen *vs.* Doutre (L. R.), 9 Appeal, 745 (1885).

Also before the Privy Council from Canada; and money, upon a *quantum meruit*, was recovered therein for balance of a fee due to the suppliant as counsel to the Canadian Government before the fishery commission, at Halifax, in 1875.

The above cases were brought *under a statute* of Canada; which, however, left *the right to the proceeding* as at common law. Statutes to the same end are almost universal in the English colonies. I may instance Victoria, West Australia, New Zealand, New South Wales, Jamaica, Grenada, Hong Kong, Gold Coast, Newfoundland, Honduras, and Manitoba.

So that, to allude to Mr. Webster's fine saying, the right of controlling the British Crown by civil suits in cases of contract has followed the British *drum-beat* around the world; and that, too, as a still more impressive suggestion of the highest attributes of that society. Only, possibly, as to those Englishmen who founded great common-law colonies south of the St. Lawrence can it be suggested that this heritage has been lost out of that common law; and that because those colonies sought to *improve* their fortunes by becoming citizens of a freer government, and by vesting the powers of society in persons, natural and artificial, who, as a component part of the design, were to be shorn of any prerogative of interfering with private right.

Thomas *vs.* The Queen (L. R.), 10 Q. B., 31 (1874).

The suppliant recovered money upon a contract with the Secretary at War respecting an invention connected with rifled artillery, which he had been engaged to exhibit to a board of officers, &c.

This is a leading case upon Petition of Right for breach of contract. It relies mainly upon Lord Somers' Opinion in the Bankers' Case, cited above.

The Queen and Von Frantzius, 2 De Gex and Jones, 126 (1858).

This was brought by a native of Prussia for breach of contract by the lords of admiralty in refusing to accept pork for the Baltic fleet. After issue and trial the claim was settled by the Crown.

Tobin *vs.* The Queen, 16 C. B. (N. S.), 310 (1864).
Feather *vs.* The Queen, 6 Best & S., 257 (1865).

These were cases of personal *torts* committed by public officers (1) in suppressing the slave trade, and (2) in infringing a patent; and it was held that they would not lie.

Canterbury *vs.* The Attorney General, 1 Phill. Ch., 306 (1842).

Suppliant had been Speaker of the House of Commons, in 1834, when the Parliament Houses were burned.

The fire had been caused by negligence in some servants, and the Speaker lost certain valuable furniture, &c. The petition was filed in 1840.

This also was an action for tort, and failed.

Monckton *vs.* The Attorney General, 2 McN. & G., 402 (1850).

The suppliants had previously been parties to a suit in equity, in the course of which the money here in suit had been paid to the Crown: Held, that they were bound by such order.

De Bode *vs.* The Queen, 3 H. L. Cases, 449 (1851).
Frith *vs.* The Queen (L. R.), 7 Exch., 365 (1872).
Rustomjee *vs.* The Queen (L. R.), 2 Q. B. (1876).

These three cases resemble each other in that the *right* in question had originally been against foreign subjects or sovereigns (either *France* or *the King of Oude or certain Chinese merchants*), the suppliant in each case contending that because *on account of such right* certain property had been transferred by a foreign government under treaty to the Queen, thereupon the latter became at once party *defendant* to such *right*, and in that respect subject to the judicial power of the Kingdom.

Inasmuch as such property had been obtained by sovereign action of the political department of the Government, it did not become subject to the judicial department until declared so by the former. In transacting with foreign governments the political department is not subject to be embarrassed by action of courts.

Besides Parliament had legislated upon the subject, and that body is *sovereign* in the fullest sense.

Churchward *vs.* The Queen (L. R.), Q. B., 173 (1865).

Petition upon breach of contract for carrying the mails to the Continent, &c.

Held, that as the contract was *expressly* subject to appropriation *by Parliament*, and as the latter had forbidden money to be paid thereupon, the petition did not lie.

Kirk *vs.* The Queen (L. R.), 14 Eq., 558 (1872).

Petition for an injunction and account upon a breach of contract coming up on motions, and continued to a hearing.

This proceeding was remarked upon as irregular, because it included a certain military officer as defendant. It was admitted that he might have been made a party *after soit droit fait* had been endorsed.

Portner *vs.* Hutchinson (L. R.), 6 Appeal, 629 (1881).

This was an appeal from the supreme court of Natal, which had held that a suit might be brought against a deputy commissary general for the colony, the *judgment in which would bind the colonial revenue*, the claim being for breach of contract in transporting troops, &c. Held erroneous.

Irwin *vs.* Grey, 3 F. & F., 635 (A. D. 1862).

This was an action against Grey, as Secretary of State for the Home Department, *for not submitting* a petition of right, as directed by the statute (23 and 24 Victoria). The proof showed that the Secretary had submitted the petition, but *did not advise* its allowance. *Nonsuit.*

Upon a rule for new trial, Erle, C. J., *reported* that Grey testified that *he had submitted* the petition, and had asked the Queen's pleasure thereabouts; when she asked his advice, and he, in accordance with opinions of the law officers, thereupon advised that it be *not granted.* The plaintiff contended that Grey should have advised the contrary. The court thought that the secretary had submitted the petition, and that the advice which he had given should not have been disclosed, and that no action lies for advice given under such circumstances.

The report does not say whether the petition stated a *right.* As the advice of the *law officers* was followed, the natural supposition is that it did not. It is plain that an official adviser of the Crown is not liable for *bona fide* advice, however mistaken. All that the case is *authority* for is in regard to *variance.*

II.

The amenability of high executive officers in North Carolina to the writ mandamus in cases otherwise proper for its issue is established by a series of cases beginning with the year 1860 and carried down to 1882. In some of these the writ was granted, and in others it was refused upon the merits, or for some other reason that assumed the existence of jurisdiction over the subject-matter. Whilst there is only one in which the jurisdiction is questioned, and that a case arising after the completion of the transaction now before the court.

Cotton *vs.* Ellis, Gov'r, &c., 7 Jones, 545 (1860).

Mandamus granted against the Governor for warrant upon the State Treasurer for a salary.

Wiley *vs.* Worth, Gov'r; Phillips' Law Rep'ts, 171 (1867).

Mandamus for a salary denied upon the ground that the applicant had not taken an oath of office.

Railroad Co. *vs.* Holden, Gov'r; 63 N. C., 410 (1869).

Mandamus to issue certain bonds denied because the plaintiff was not a corporation, and, therefore, could not sue.

Railroad Co. *vs.* Jenkins, Treas'r; 65 N. C., 173 (1871).

Mandamus allowed against the treasurer for the issue of State bonds.

Boner *vs.* Adams, Aud'r, and Jenkins, Treas'r; 65 N. C. (1871).

Mandamus refused on account of irregularity of the application.

King, Sh'ff, &c., *vs.* Hunter, &c., Comm'r; 65 N. C., 600 (1871).

Mandamus granted against Commissioners of a county as regards a duty in the collection of State taxes.

Bayne *vs.* Jenkins, Treas.; 66 N. C., 356 (1872).

Mandamus to pay coupons upon special tax bonds, refused because the plaintiff had no warrant.

Bailey *vs.* Caldwell, Gov'r; 68 N. C., 472 (1873).

Mandamus allowed against the Governor for a warrant to pay a salary.

Railroad Company *vs.* Jenkins, Treas.; 68 N. C., 502 (1873).

Mandamus granted for the exchange of certain bonds.

Railroad Company *vs.* Jenkins, Treas.; 68 N. C., 499 (1873).

Mandamus to exchange bonds, refused upon the merits.

Belmont *vs.* Reilly, Aud'r, &c.; 71 N. C., 260 (1874).

Mandamus to collect the very tax in question: Denied, because brought in vacation instead of term.

Wilson *vs.* Jenkins, Treas'r, and Reilly, Aud'r; 72 N. C., 5 (1875).

Mandamus to obtain payment of coupons issued before the war: Denied, because the statute which might have authorized the mandamus had been enacted subsequently to the statute under which the coupons were issued and had itself subsequently been repealed. The repealed statute was, of course, no part of the contract.

Railroad Co. *vs.* Brogden, Gov'r, &c., and others; 74 N. C., 707 (1876).

The Governor, Treasurer, and Auditor of the State formed a board of valuation for the taxation of railroad franchises. Mandamus granted, compelling them to revise a certain valuation.

Moore *vs.* Roberts, Auditor; 87 N. C., 11 (1882).

Application for a mandamus in respect to a salary, refused upon the merits.

Shaffer *vs.* Jenkins, Treas'r; 72 N. C., 275 (1875).

Mandamus for the payment of a warrant issued by the Governor upon the defendant, refused because forbidden by the Legislature.

Office Supreme Court U. S.
FILED,
FEB 15 1890
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES.

No 392

ALFRED H. TEMPLE,
Appellee,

AGAINST

THE STATE OF NORTH CAROLINA, et al,
Appellants.

BRIEF FOR APPELLEE.

Filed by leave of Court.

EDWARD L. ANDREWS—SAMUEL F. PHILLIPS,
Of Counsel.

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1890.

IN THE
Supreme Court of the United States.

THE STATE OF NORTH CAROLINA, *et al*, *Appellants*,

vs.

ALFRED H. TEMPLE, *Appellee*.

BRIEF FOR APPELLEE.

Filed by leave of Court.

STATEMENT.

The record presents the following facts pertinent to the legal question involved. North Carolina contracted with her bondholders that she would collect a special tax, of a specified percentage upon the value of property in the State, to pay the interest, and provide a sinking fund for the principal of her debt. The Statutory contract provides that these taxes shall be raised "as other State taxes." The method provided by law for raising State taxes, is as follows: The Auditor sets in motion the tax proceedings, by preparing a Statutory Schedule of all taxes, for transmission to the county officials. This schedule is required by law to be arranged in columns, and each Statutory Column is required to contain a designation of the purposes, or, "account," for which the tax in that column is to be raised. These columns forming this schedule, constitute the State warrants to the county officials for raising the State taxes.

By the Impairment Act of November 23d, 1874, the Auditor is ordered not to "recognize any claim for payment of interest upon any portion of the bonded debt of this State heretofore made, or provided to be made by authority of this State, except as hereafter provided by law." (Fol. 13.) The Auditor has complied with this enactment, and instead of retaining the appropriate column in the schedule, for the special tax to be raised for these bonds, he has stricken out that column, thus preventing the collection of the moneys by the county officers.

The bill alleges that "the government of the State has constantly enforced upon its officials compliance with the subsequent nullifying enactment above set forth." (Fol. 14.) The bill further shows that "Notwithstanding the invalidity of such enactments, the individual respondent herein, and the other officers of the State of North Carolina, whose respective duties it is to carry out the laws of the State, and its valid directions in regard to the raising of the said tax, and the payment of such moneys to the holders of such bonds, have refused to perform their respective official duties thereabout, claiming to be warranted in such refusal by such subsequent invalidating enactment." (Folio 15.)

The bill seeks to restrain the respondents from obeying, or paying any heed to these impairment laws—it seeks to sweep away all and every effect from these enactments—and to enforce the effectual removal of every obstacle to the collection of the tax.

The relief asked is:

That the act of November 23rd, 1874, be declared to impair the contract with the bondholders; that the respondents be enjoined from obstructing, or in any manner impeding the collection of the special tax; that the

State of North Carolina, its Auditor, and its executive agents, be decreed to execute the act of January 29th, 1869, and to cause the proper Statutory Lists to be issued.

The complainant is a citizen of North Carolina, and he joins, as defendants, the State, and its Auditor. The decree directs the execution of the provisions of the act of 1869—for the collection of the special tax. The question of the proper relief which should be granted under the jurisdiction claimed, is one of the questions involved in this appeal.

ARGUMENT.

The jurisdiction over States, in the class of cases represented by this litigation, is claimed under the clause of the Judiciary Article which provides that—"*The Judicial power shall extend to all cases in law and equity arising under this Constitution.*" It is but a repetition of the decisions of this Court (Martin vs. Hunter, 1 Wheaton 304; Cohens vs. Virginia, 6 Wheaton 264), to state that there are two distinct and substantive elements of jurisdiction incorporated in the judiciary article. The subject matter clause above quoted confers jurisdiction, irrespective of the parties—upon the sole ground of the Federal question involved. The party clauses of the article provide jurisdiction, irrespective of the nature of the action, upon the sole ground of the character of the litigants. The purposes and scope of these several clauses are radically different, and upon that difference the spirit of our argument is predicated. To repeat the language of this Court:

"*When we consider the great purpose for which jurisdiction over all cases arising under the Consti-*

tution is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think that a case arising under the Constitution or laws of the United States is cognizable in the courts of the Union, whoever may be the parties to the case (Cohens vs. Virginia)."

Are the defendants then entitled to except States—the main objects of the Constitutional prohibitions—from the broad, comprehensive language of the subject matter clause? They claim this exception under the general principle of the inherent immunity from suit, possessed by sovereign States. We shall not discuss that broad question, but will limit our inquiry to the ascertainment of its application to States in the Federal Union, and in respect of their Federal obligations. At the inception of this discussion, it is important to recall that the Constitution provided for the complete subjection of States in the Union to judicial process. This was the theory which the Convention contemplated—by which the judicial powers were traced—and under which they were finally formulated (Party clauses of the judiciary article). Therefore, whatever may be the immunity from suit enjoyed by sovereign powers, it must be conceded that the framers of the Government rejected that theory in respect of the States, as political bodies, to subsist under the Constitution. In this aspect of the matter, it is apparent that those who propose to except States from the all-embracing language of the subject matter clause, must rest their argument upon some other basis than the abstract theory of sovereign immunity from suit. That

theory was practically reversed by the Constitution, in its application to States in the Union. It can have no place there as a predicate on which to found a theory for contracting the plenary language of the subject matter clause. In short, the affirmative does not rest upon those who refer to the letter of the Judiciary Article as inclusive of States as defendants; but it rests with those who seek to introduce an exception into that body of Federal power. Therefore, the defendants must resort to some other notion than the *a priori* doctrine which they have sought to inject into the Constitution, in defiance of the plain purport of its broad judicial powers.

When the case for the defense is examined, it will, indeed, be found to involve the idea that by a subsequent change in the Constitution—the Eleventh Amendment—the theory of sovereign immunity from suit has been installed in the body of Federal law.

In the first place, we urge that the Eleventh Amendment has nothing whatever to do with this case. The absence from its language of any provision against suits against States, arising under the Constitution and brought by their respective citizens, was not an omission, but is entirely consonant with the purposes and spirit of the Amendment. At this point, we will merely quote the language of this Court:

"But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the Eleventh Amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not then within the amendment, but is governed entirely by the Constitution as originally framed, and we have already seen that in its origin the

judicial power was extended to all cases arising under the Constitution or laws of the United States, without respect to parties." (Cohens vs. Virginia).

We shall now merely state, in general terms, what we deem to be the true principle for estimating the due effect of the Eleventh Amendment. This Court has already laid the foundation for solving this point, by its decision in Cohens vs. Virginia. It has there demonstrated that the whole tenor and spirit of the Constitution coincide with the language of the subject matter clause, to extend it over all litigations for the protection and enforcement of Federal rights, whomsoever may be the plaintiffs, and whether, or not, States be the defendants. If this be demonstrated, then it will follow necessarily that the Eleventh Amendment does not in spirit—as it certainly does not in terms—affect the previously granted jurisdiction over causes like the one at bar. In the language of Mr. Pinckney, in his prevailing argument in Cohens vs. Virginia, "*The Constitution authorized direct control over States or private individuals indifferently. The amendment has partly taken this away, but the spirit of the Constitution is still manifested by the former provision.*"

The point is summed up in this way; For the redress of Federal rights—to subserve the great objects of the Federal Government—the Constitution authorized suits against States at the instance of any plaintiff:

For any non-Federal cause, it authorized suits against States where differing citizenship, or alienage, rendered the jurisdiction of the United States Courts appropriate.

The history of the Eleventh Amendment demonstrates that it was directed solely to this latter jurisdiction. It did not purpose to infringe on the jurisdic-

tion for the redress and enforcement of Federal rights. It did not involve the conception that contracts made with States were laid prostrate before *legislative* action. It made no such change in the organic structure of the Government, but simply prevented the use of the Federal Courts for the collection of claims against State debtors, or the enforcement of rights dependent on the general principles of law and equity. It left the vigor of the Federal jurisdiction unimpaired, in terms and in spirit, for the enforcement against States of the duties which owed their origin to the Federal system.

The Eleventh Amendment has no retroactive effect upon the *construction* of the subject matter clause. We have seen that at the time the judicial power was constituted, its scope included every possible litigious assault upon members of the Federal Union (except, of course, by their own respective citizens), without regard to the nature of the cases. The Supreme Court so declared the law in Chisholm vs. Georgia, 2 Dall. 419. For all purposes of general construction that decision must ever be deemed the true "law of the Constitution." The Eleventh Amendment has destroyed its practical effect, but the Constitution was thus interpreted by that department of the Government, in which the power of interpretation was reposed. Hence, this Court has said, in reference to this very clause of the Constitution, thus held to authorize suits against States, by aliens, or citizens of other States, that—

"This feature is no longer found in the Constitution, but it aids in the construction of those clauses with which it was originally associated." (Fletcher vs. Peck., 6 Cranch, p. 87.)

Obviously, we cannot ascertain what the framers of the Constitution meant, if we dissociate one clause from another clause, as it legally stood at the time of the adoption of the Constitution.

Bearing in mind that at the time of the adoption of the subject matter clause, the immunity and dignity of the States was so little regarded that they were subjected to suits for the mere collection of petty debts—where no governmental principle was involved, and no National purpose was subserved; it is not to be supposed that in framing the subject matter clause—which was intended to maintain the integrity of the Federal system—these same men intended to exclude States from its operation. The whole tenor and spirit of the Constitution repel such an idea. The 10th section of the 1st article of the Constitution, contains numerous prohibitions against State action. This Court has told us that State laws impairing the obligation of State contracts, are as much within the terms of the prohibition, as State laws impairing the obligation of mere private contracts. (Fletcher vs. Peck, Supra). The judicial power is expressly made co-extensive with the Constitution. It is not, therefore, rational to conclude that the United States was excluded from authority to protect against violations of the Federal rights of its citizens by the States of the Union—States that were specifically named as defendants in the most ordinary controversies. The act of 1875, for the first time, conferred this original jurisdiction on the Circuit Courts. (Ames vs. Kansas, 111 U. S., 449.) If it had existed at the time that this Court decided Cohens vs. Virginia, no one can doubt, after reading the opinion, that that court would have maintained the jurisdiction in this cause—would have held that States are justiciable for the redress of

a Federal wrong, and the enforcement of a Federal right.

In our view, unless the appellants can present some novel reason for an implied restriction upon the judicial power, under the subject matter clause—can reverse the principle of Cohens vs. Virginia, decided after the Eleventh Amendment—the jurisdiction must be maintained. We have not heard any such reasons advanced.

On the contrary, as far as we can apply the tests to the judicial power that are usually applied for ascertaining the breadth and depth of any public power, the reasons for maintaining its plenitude are greatly strengthened. For this purpose, we invoke the nature of the authority exercised in its formation; the subjects of public welfare on which it was to operate; and the character of the public agencies which it employs in its execution. Let us, at the risk of dealing with platitudes, say a few words about the theory of constitutional interpretation which the respondents silently invoke. Their argument seems to assume that when States are not named in each and every part of the Judiciary Article, they are to be excluded as a matter of course. This theory is oblivious of the nature of the power with which we are dealing. This is not a question whether a power to protect against invasions of Federal rights by States is granted, or reserved. It is not even a question of implied powers. It is simply a question how the language in which a general grant of power is conveyed should be construed.

In Cohens vs. Virginia, this Court says:

"The jurisdiction of the Court then being extended by the letter of the Constitution to all cases arising

under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to over-rule the words which the framers have employed."

There is no theory involved in the formation of the Union which would justify the erection of some postulate of sovereignty against the language of the party and the subject matter clauses. This Court has held that "This Government is not carved out of any existing State sovereignties." (Martin vs. Hunter Supra). The Constitution is the organic act of the collective people of the United States. The States were employed as convenient electoral circumscriptions in its adoption. This was a matter of process. But the instrument itself, when adopted, spoke by the collective voice of the people of the United States. (Martin vs. Hunter).

The preamble had been changed from "We, the people of the State of New Hampshire, &c.," to "*We, the people of the United States.*" This had been done by that ardent Federalist, Gouverneur Morris. This expressive alteration was coupled with the provision for ratification by the people in conventions, expressly called.

When the preamble was under discussion in the Virginia convention, Patrick Henry was prescient of the radical change which it imported into the theory of the Government, and from his anti-Federalist point of view was well justified in exclaiming, "*By what authority do they say, 'We, the people of the United States,' instead of 'We, the people of the States.'*"

An important principle of interpretation flows from the fact of this common political origin of the present State and the Federal powers—from the source of both being in the simultaneous action of the people. When we are seeking to determine the effect of the language in which a Federal power is enumerated, we are not to contract its meaning, as if it were a public grant from the States to the United States. But, springing from the same source, the fullness and vigor of their terms and spirit, as original political powers, are to be elicited.

This principle of interpretation is peculiarly applicable to the scope of the subject matter clause of the Judiciary Article, as illustrated by the party clauses of the same Article.

The principle which pervades the subject matter power of the Federal Courts is the doctrine of the supremacy of the power of the United States. It vitalizes the Constitution from a declaration of principles to a rule of action. It is a principle of supremacy in fact, as well as in theory. It informs and infuses all the departments of Federal power, and furnishes the true guide for solving any problem concerning their scope. In respect of the necessity of making the Federal power supreme, it may be truly said that no differences existed in the Constitutional Convention. Those differences related to the extent which the Federal power should assume. But none existed as to the essentiality of making that power paramount within its prescribed limits.

This recognition of the theory of the Federal supremacy is illustrated by the suggestion of some form of coercion by the adherents of the several methods of

government proposed in the Convention. Those who limited the purview of their action to the mere enlargement of the powers of the Confederation, without any change in the principle on which the governmental fabric was to be constructed, advocated the employment of force, as the proper method for compelling compliance with the requirements of the general authority, in respect of quotas and requisitions. Direct legislative action by the Federal Congress was for a long period during the sessions of the convention, a favorite method for enforcing all branches of the National supremacy. Finally, the perfected form of judicial coercion was adopted by the convention. and proved a complete and harmonious sanction for the supremacy of the National authority.

This great underlying principle was embodied in the resolutions reported to the Convention from the Committee of the Whole: That the Government should consist of a supreme legislative, executive, and judicial authority: Second, that the National legislature ought to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the National legislature, the articles of Union, or any treaties subsisting under the authority of the Union: Third, that the legislative acts of the United States made by authority and in pursuance of the articles of the Union, and all treaties made and ratified under the authority of the United States shall be the supreme law of the respective States, so far as

these acts or treaties shall relate to the said States, or their citizens or inhabitants; and that the judiciary of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding: Fourth, that the officers of the States and nation shall be bound by oath to support the articles of Union: Fifth, that the jurisdiction of the National Judiciary shall extend to cases arising under laws passed by the general legislature; and to such other questions as involve the National peace and harmony: Sixth, that the Constitution should be adopted by representatives of the people, to be expressly chosen.

This ideal of the National supremacy—the idea that this was to be a government of paramount authority, capable of the fullest enforcement of all its rights—was finally crystallized in the Constitution as adopted. The substantive supremacy clause, the Ford, quoted above from the report of the Committee of the Whole, was included in substantially the same terms in the first draft reported from the Committee of Detail. It now stands as the sixth Article of the Constitution, incorporating such amendments as were made during the consideration of the report of the Committee of Detail:

"*This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*"

The words "This Constitution" had been added, and for the words "shall be the supreme law of the several States" the words, "the law of the land," had been substituted.

This provision was introduced by Luther Martin as a substitute for the negative by the National legislature, upon all laws of the States, contravening the Articles of the Union. His object, as an anti-Federalist, was to transfer this power of determining the constitutionality of State laws to the State Judiciary, and for this purpose to bind them to recognize the supremacy of the Federal Constitution and laws.

Afterwards the Federal Judicial power became the complete substitute for all other means of coercion. But the substantive supremacy clause was retained in the Constitution, and enlarged, and its enforcement entrusted to the Federal, as well as to the State Judiciary.

These elements were introduced into the Federal body politic with the design of preventing its principles and its powers from being mere *bruta fulmina*. Their effect is imported into the construction of the whole tenor and spirit of the Constitution, and excludes any implied limitation upon the general terms in which its powers are constituted.

We have seen that the people of the United States constituted the new political solvent that acted upon all existent public powers. The States became affected by the express grants to the National Government; by the prohibitions on the States, and finally by the creation of a new class of civil rights in their own citizens. States that are affected by a Federal instrument merely in respect of their external relations may still retain much of their independent character. But when the Federal organic instrument trenches on the relations between the States and their own respective citizens their political character is essentially modified. They became, under the same name, essentially differ-

ent political organizations. Their relations to their own citizens in respect of contracts had been essentially changed. This was a renunciation by the people themselves of a power which they had never theretofore renounced; namely, the power to subvert contracts. They disabled themselves from exercising this plenary power over contracts through their State Legislatures. They conferred the reverse power—to maintain the inviolability of contracts—on the Federal Government. So important have this, and the cognate clauses, seemed to this court, that in Fletcher vs. Peck, it calls them a Bill of Rights for the people of the States. A change of this nature—entering into the internal polity of the States—moulded and diminished them as political societies. They were still called States, but in many of the essentials to the minds of publicists, they were no longer the same aggregates of political power. When the Convention framed a coercive power for the Federal system, it applied it upon bodies politic, which were intended by the previous action of the Convention to be greatly reduced in their political characteristics. The States thus deprived of much of their character as independent political societies, were prepared for the application of compulsive judicial powers.

Is there anything in the nature of these Federal rights, on which the judicial power was to operate, to indicate an implied limitation in its scope? This is far from being the case. Much has been said about the comparative absence of debate on the adoption of the contract clause in the Convention, and the idea has been suggested, that it was not thought to possess the great scope and im-

portance which it has since assumed. But the reason for this absence of discussion lies in the fact that there was a concensus of opinion in its favor. The familiar historical details in reference to the state of legislation regarding public and private contracts were present to the mind of the convention. They contributed to bring about the unanimity which pervaded that body regarding the necessity for a check upon the State power in this particular.

To form an adequate idea of the true place which this limitation upon the power of the States over contracts occupies in, the Federal system it should not be considered alone. It is part and parcel of an entire system of Federal polity. The United States governmental fabric reposes essentially upon an industrial spirit. None of the traditional elements of authority, which form the basis of European State power contributed to its formation. Not even the principles of personal liberty, which had entered so largely into the establishment of the Colonial system, were involved in the formative principles of the new government. The doctrines of political liberty, which had brought about the separation from the mother country, had already been secured. The Federal Government is unique in being solely the product of fiscal, financial, and commercial exigencies. Revenue, navigation, public credit, commerce, are its integral elements. The various provisions for regulating commerce; coining money; borrowing money; providing revenue; fixing standards of weights and measures;

establishing bankrupt laws, and against laws impairing contracts, form part and parcel of one entire system.

One feature which had become embodied in the system of public obligations should be noted here. It will be seen to have an important bearing upon the distributive application of the party, and the subject matter clauses of the Judiciary Article. It consisted in the differentiation between common unsecured obligations; and bonds or certificates issued by the Colonies, States, and other public bodies with special securities attached to them. From an early Colonial period, the practice prevailed of accompanying each legislative obligation by a special security.

In Briscoe vs. The Bank, this Court recognized the prevalence of this dual system. "Funds arising from certain sources of taxation were pledged for their redemption, in some instances; in others they were issued without such pledges." (11 Peters, 257.) The nature of these secured public obligations must have been present to the minds of the members of the Convention. As they were self-executing, not requiring any further legislation for the benefit of the holders, they could be affected only by the passage of laws impairing these special securities. When we come to consider the judicial sanction provided in the Constitution for "cases arising under the Constitution," we will perceive its peculiar applicability to State legislation against special securities provided for their own obligations.

Such being the organic nature of the Federal power, and such being the character of the subjects on which it was to operate, it remains now to consider the scope of the judicial power, which was to act under this

political fabric. No government was ever framed with a more exalted conception of the nature of judicial power. Throughout the proceedings of the convention, a steady progress is maintained towards its enlargement as an element of the Federal system. All the judicial powers which were, in the early drafts of the Constitution, reposed in the Senate, or in the entire legislative body, were gradually transferred to the judiciary. These were powers that acted directly upon the States, and State legislation. All the judicial powers which were vested in Congress under the Confederation—to adjudicate all questions between States—were finally reposed in the Judiciary department. The power of negating State laws was transferred from Congress to the judiciary. Even the transfer of power over impeachments to the legislative body was a tribute to the true nature of the judicial power. That change arose from a realization that such power assimilated more nearly to addresses by the two Houses of Parliament than to regular judicial proceedings. Pursuant to this idea, the regular action of the judicial authority was made to attach after an impeachment, thus correlating the two powers according to their respective essential characteristics.

There was also an historic reason for the amplification of the judicial power. At the period of the Convention a widespread feeling existed against the Courts as enforcers of rights. This sentiment had greatly contributed to Shay's rebellion. The Convention realized this agrarian feeling as a serious detriment to the body politic, and determined upon a proportionate vigor and elevation of the judicial power.

Before tracing the progress of the Judiciary Article through the Convention, something should be said in

reference to the theory of the State organizations on which it was to operate. In analyzing the scope of any constitutional power affecting the States, it is an error to confine our view to the political status of the States as they existed immediately antecedent to the Convention. A body proceeding to make organic changes, and invoking the action of the people, did not proceed upon any such narrow view of the bodies politic with which it was dealing. The men of the Convention were familiar with the entire sequence of the political history of the States—with all of it historically, and much of it personally. Most of the members of the Convention had participated in the circle of events from the Colonial period to 1787. They knew that the colonies, whether provincial, proprietary, or charter, were in theory and substance, mere municipal corporations with limited political functions. They were aware that the provincial governments were subject theoretically to the uncontrolled will of the sovereign—they were not held of the realm, but of the monarch—That the proprietary governments were equally under the regalian power of their patrons, subject to the overruling power of the crown, under the patents. In the charter governments, their political existence was subject to the more formal, but not less effective proceeding of *quo warranto*, in the King's Bench, and *scire facias* in chancery. The English Revolution had only substituted the domination of Parliament for that of the Crown. Only a few years before the Revolution, the members of the Convention had seen three New England colonies decreed out of political existence by the Lord Chancellor of Great Britain. It is familiar history that the colonists did not establish State government dissociated in theory from the British Crown, until after

they had petitioned Congress, and were authorized "to take up government." The strong assertion of State power under the Confederation, which had brought about the Convention, it was, at the same time, the object of the Convention to reduce. And in dealing with this subject matter, and with these bodies politic, the framers of the Constitution did not confine their mental vision to the recent theory of State exaltation, but surveyed this whole historical field—they remembering that only eleven years had elapsed since the States were municipal corporations, justiciable as much as any borough in England. Above all, they proceeded upon the basis of the eliminations from the powers of the States, effected by the preceding Articles which they had just adopted. The States so constituted for which they were about to provide judicial compulsion were very different from the States then existing under the Confederation.

With their views of the exalted nature of the judicial power under the Federal system that they were framing, and with a due sense of the essential importance of the civic rights which that Judiciary would be called upon to enforce, and with a complete historic sense of the character of the bodies politic affected by the provisions of the Constitution, the Convention proceeded among the last of its functions, to frame the Judicial system for the Federal Government. The fundamental principles of the Judicial power as declared by the Committee of the Whole, were:

"That the jurisdiction of the National Judiciary shall extend to all cases arising under laws passed by the general legislature, and to such other cases as involve the National peace and harmony."

It should be noted that when the terms of the judicial power were thus expressed, the scheme of government contemplated the action of a congressional negative over State legislation. Hence the principle of judicial power was not extended beyond "cases arising under laws passed by the general legislature." This would include negating laws against State enactments. We find the same feature running *pari passu* in the supremacy clause. As long as the congressional negatory system was retained, the declaration of supremacy related only to Federal "laws." With its cancellation, "the Constitution" was included in the supremacy prevision.

The report of the Committee of Detail (leaving out irrelevant matters) provided in reference to this subject as follows:

"The jurisdiction of the supreme Court shall extend to all cases arising under the laws passed by the Legislature of the United States; to controversies between two or more States, [with an exception afterward expunged]; between a State and citizens of another State; between citizens of different States; and between a State and the citizens thereof; and foreign States, citizens, or subjects."

When this report came before the Convention, William Samuel Johnson, of Connecticut, moved to insert the words "this Constitution," after the word "under," in the first clause; and the motion was adopted. The Convention, likewise on motion of Mr. Johnson, inserted the words "both in law and equity," after the word "cases," in the first clause. On motion of Benjamin Franklin, the words "and treaties made in pursuance thereof," were inserted after the words "United States."

The Committee of Revision subsequently changed the phraseology so as to substitute "the judicial power" for the words "jurisdiction of the Supreme Court." They also substituted the language, "laws of the United States," for "laws passed by the Legislature of the United States." The words "treaties made, or which shall be made under their authority," were also substituted for "treaties made in pursuance thereof."

In connection with the completion of the Judiciary Article, it is suggestive to quote the following letter from its author:

December 22d, 1814.

TIMOTHY PICKERING, Esq.:

What can a history of the Constitution avail towards interpreting its provisions? This must be done by comparing the plain import of the words with the general tenor and object of the instrument. That instrument was written by the fingers which wrote this letter. Having rejected redundant and equivocal terms, I believe it to be as clear as our language would permit, excepting nevertheless a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which, *expressing my own opinion*, would not *alarm others*, nor shock their self love, and to the best of my recollection this was the only part which passed without cavil.

GOUVERNEUR MORRIS.

It is also proper to note that these words fell from a statesman who, on the floor of the Convention, speaking of State importance, said: "We cannot annihilate, but we may perhaps take out the teeth of the serpents."

Looking at the Judiciary Article as a whole, the first suggestion is the essential character of the subject matter clause; that was necessary to the Judicial Department of the new government. It was part and parcel of the principle of supremacy which lay at its foundation. The party clauses are valuable and important, but they are not essential—they are in some sense extrinsic to the completeness of the system. The new government could have dispensed with them; but it could not have dispensed with the power which was to expound and enforce the organic law. Hence, if any part of the Judiciary Article requires the amplest recognition, it is the subject matter clause.

A suggestion applies here deducible from the nature of subject matter jurisdiction. It is potential on account of the character of the dispute, and when this exists all entities are drawn within its circle, *A fortiori*, where those entities are the objects of the mandates of the instrument.

There is certainly nothing in the amplitude of the language in which this power is expressed on which to predicate an exception. Unless we are to adopt some theory of an implied restriction of the Federal Judicial power, the proper rule to apply to this subject matter clause is:

Can a case arise under the Constitution against a State by one of its citizens? If such a case does arise, it must fall within this judicial power.

The addition of the words "this Constitution" are of potent effect. They made the judicial power co-extensive with the Constitutional, as well as with the legislative powers. As the States were main subjects of Constitutional prohibition, they fell naturally and necessarily within the purview of the clause. Indeed, the adoption

of any Federal system containing prohibitions upon its members, accompanied by the mere establishment of a Judicial Department, would upon the plainest rational principles, entail the enforcement of those prohibitions by the judiciary. But the Constitution did not leave us to any implication. It expressly extended the judicial power over Constitutional provisions, as well as legislative enactments. At the same time, it declared that Constitution, as well as the laws supreme, and vested the guardianship of that supremacy in the judicial instead of the legislative department. It is apparent from this outline of the progress of the Judiciary Article that the words "both in law and equity," were introduced for the purpose of extending the scope of the judicial power. In no sense are these inserted words to be taken as implying any technical limitation upon the scope of the judicial power—in respect of parties or subject matter. William Samuel Johnson came from a State where any other than the processes of the common law were unused. (Federalist No. 83). He designed to obviate, for the Federal Courts, the difficulties he had observed in the administration of Connecticut jurisprudence, and to secure for them full equitable, as well as common law powers.

An objection has been suggested, based upon the use of the word "case;" and it has been claimed that this term must be treated in a technical sense, and restricted to a litigation against parties who were justiciable before the adoption of the Constitution. It would seem to be a sufficient answer to this point to refer to the distributive clause of the Judiciary Article. "*In all cases, in which a State shall be a party, the Supreme Court shall have original jurisdiction.*" As this would include all manner of suits *against* States, by American

States, foreign States, &c., it is apparent that the framers of the Constitution did not use the word "case" in any such narrow sense as has been suggested. A case must be presented according to the methods of common law or equity. But neither the subject matter nor the parties are thereby restricted. It may be a "case," in the sense of the Constitution, though a State be the defendant.

The States being justiciable under the subject matter clause, it would be merely a repetition of what this Court said in Cohens vs. Virginia, to add that the language of the Eleventh Amendment does not, in any event, affect that justiciability, when it is invoked by a citizen of the State sued. But the logic of the situation may render it proper to advance further on this line.

In Wisconsin vs. The Pelican Insurance Company, this Court held that its jurisdiction over suits by States is limited by the character of the suit itself. In short, that there are inherent limitations to such proceedings. We invoke a similar principle in the construction of the Eleventh Amendment, and ask that it be considered in the light of its surrounding history and real purposes. (127 U. S., 265).

The Eleventh Amendment is a modification of the party clause of the Judiciary Article. Its history demonstrates that it had no reference to the subject matter clause. The suits which occasioned its passage were action in assumpsit, or of like nature—intended, by some form of legal or equitable proceeding, to compel the payment of State debts. The objection sought to be remedied by the Amendment related solely to the mere non-payment of debts—not to the passage of impairment laws. If any draftsman had intended to con-

fine its effect to the party clause alone, he could not have employed more appropriate language.

Impairment laws had not then become a practical subject. No unconstitutional legislation had been enacted, and it was of course not present to the public mind. The adopters of the Amendment had no conception that they were permitting States to invade the Federal rights of their citizens, or of anyone else. State obligations, with special securities, that were self-executing, in the sense of requiring no additional legislation, were familiar to them. The contract clause of the Constitution applied to these, as well as to ordinary common law obligations—like those involved in the cases which preceded the Amendment. A mere failure to pay had occasioned the invoking of the jurisdiction under the party clause, in Chisolm against Georgia.

But where executive action was devolved upon State officers for the security of the creditor, no difficulty in enforcing the duty of that officer could supervene, except by and on account of the passage of an impairment law. The jurisdiction to protect and enforce rights arising upon such impairment law, incorporated in the subject matter clause, remained unaffected by the Amendment. Where a State herself was the contracting party, this jurisdiction could be effectual only by her joinder as a party. Such is the true nature and scope of the Amendment when admeasured by the entire Constitution. By this natural construction, the contract and judiciary provisions are maintained in equal plenitude, and this special change in the party clauses is harmonized with them.

When this case was presented orally, we had assumed that the demonstration of the nature of the subject

matter clause would, of itself, have eliminated a discussion of the Eleventh Amendment. Evidently, if the subject matter clause invested the Federal Courts with jurisdiction of all cases—including cases against States—arising from an invasion of a Federal right; and whether such suits were brought by a resident, non-resident in other States, or in the Territories, or in the District of Columbia, or by an alien; it would make no difference in the case at bar if the Eleventh Amendment had taken away this jurisdiction in suits brought by residents of other States and aliens. As the subject matter jurisdiction was not conferred for the benefit of any parties whatsoever, but for the sake of maintaining great governmental principles—such as the inviolability of contracts from the legislative assaults of States—there would have been no good reason for minimizing its scope, by implication, even if the amendment had in terms diminished the subject matter jurisdiction, in the cases of non-resident or alien plaintiffs. (Cohens vs. Virginia, Supra.)

But we find that the language of the Amendment coincides with the circumstances which gave rise to it, all of which clearly point to the party clauses. The Supreme Court had said that controversies "between a State and citizens of another State, and between a State and foreign citizens," meant suits brought by non-residents and aliens against States, as well as suits brought by States against non-residents and aliens. The Eleventh Amendment said: "The judicial power shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or citizens or subject of a foreign State." When this phraseology is considered, its sole application to the party clauses will

be apparent. When a suit is brought under the subject matter clause, neither the citizenship of the plaintiff, nor of the defendant has the sligtest materiality. It need not be alleged. Both parties may be citizens of the same State. [In the case at bar, the citizenship of the plaintiff is alleged merely to eliminate this very discussion, by taking the case out of the terms of the Amendment. (Cohens vs. Virginia. Supra)]. This being the nature of a suit under the subject matter clause, it will be apparent that the Amendment, by its verbal apposition of parties, contemplated the exact change in the party clauses to which its origin had naturally led up. It was directed to suits against a State by certain parties—*because* they were such parties. No language could have been more natural nor more appropriate to this specific object. It would have been easy enough to have included subject matter jurisdiction—where States were defendants—if such an idea had entered the minds of the framers of the Amendment; if they had contemplated such a radical change, as subtracting the judicial sanction for the integrity of the Federal institutions. But as impairment laws were then unknown, so they were not thought of by Congress.

Another feature in the verbiage of the Amendment confirms this view. It specifies "suits commenced," as well as "prosecuted." Under this clause of the Amennment, the then pending suits against States, on the docket of this Court, were stricken off. This language of the Amendment shows that the framers had in their minds the particular class of suits which had occasioned its passage. While the Amendment should be given full weight as the latest expression, it should not on any principle of construction be dissociated from the parts of the Constitution which it was designed to amend.

If any argument were needed to show that the Amendment should not be extended beyond the party clauses, it would be found in the continued jurisdiction to protect the Federal rights of citizens from the action of their respective States. While such a jurisdiction has been held by this Court to be unaffected by the Amendment, it would be an anomaly—though not less an actuality for that reason—so to construe the Amendment as to affect the Federal rights of any other plaintiffs. But because of the essential reasons pertaining to the maintenance of the Federal system, all the presumptions are against such a construction of the Amendment, as would subtract the jurisdiction of the Federal Courts, in cases arising under the Constitution and brought by any plaintiff.

The defendants seek to reflect a favorable light upon their effort to exclude States from the broad language of the subject matter clause, by referring to the provisions of Section 13 of the Judiciary Act—which contains this language:

"That the Supreme Court shall have exclusive juris-
"diction of all controversies of a civil nature where a
"State is a party, except between a State and its citi-
"zens, or between a State and citizens of other States
"or aliens, in which latter case it shall have original
" but not exclusive jurisdiction."

The true solution of this clause is to be found in the continued application of the broad difference between the subject matter portion, and the party portion, of the Judiciary Article. The section of the Judiciary Act, from which the quotation is made, had reference solely and entirely to defining the jurisdiction in reference to parties. The subject matter jurisdiction was provided

for in a subsequent section. The exception of suits between a State and one of its citizens was desirable to meet a prevailing objection; that the Constitution conferred such jurisdiction in ordinary suits between a State and one of its citizens. Oliver Ellsworth, in drafting the Judiciary Article, took into account the state of facts and public opinion, which then existed in regard to the assumed extent of the Federal judiciary powers. It will be remembered that the proposed ten Constitutional Amendments were then pending, including others of considerable scope. This idea, that a citizen might sue his own State upon any cause of action, was due in great part to the distributive clauses of the Judiciary Article—providing that the Supreme Court should have original jurisdiction of all suits to which a State is a party. The true theory, afterwards established, that these clauses gave no additional powers to the Supreme Court, but were only an allotment of the grant of powers in the previous section, was not then so well understood. Hence, there was a great deal of discussion in the State Conventions, and in the press, to the effect, that upon any claim whatever, a citizen of any State might sue his own State. The framer of the Judiciary Article, who had been a Judge in Connecticut, and a member of the Federal Convention, proposed to obviate this objection by the foregoing language. It may be mentioned that there was some historical color for the public impression which then existed in reference to this asserted scope of the Judiciary Article. On the 22d of May, 1779, the Continental Congress, resolved, "that it be recommended to the inhabitants of the said pretended State of Vermont, to return peaceably to their former jurisdiction; that is to say, those who have separated from the State of New York, to the State of

New York; and those who have separated from the State of New Hampshire, to the State of New Hampshire; and resolved that Congress will then interpose to obtain a redress of any grievance of which the said *inhabitants* may have cause to complain from said *respective* States." In the Virginia Ratification Convention Mr. Mason said: "*The last clause is still more improper. To give them cognizance in disputes between a State and the citizens thereof is utterly inconsistent with reason or good policy.*" Indeed, the extreme notions which prevailed among the anti-Federalists in reference to the extent of the Federal judiciary power may now fairly be classed among the curiosities of literature. It suffices to say here that the statutory definition of the original jurisdiction of the Supreme Court was made with reference to these extreme views—claiming its power to extend over all suits to which a State may be a party, whether brought by one of its citizens, or not. The jurisdiction under the subject matter clause, it will, of course, be remembered, was provided for in a subsequent section of the Judiciary Act, under the appellate jurisdiction of this Court. In short, the Judiciary Act excludes a conclusion which no one would now entertain—that in ordinary non-Federal causes, this Court would have original jurisdiction of a suit brought against a State by one of its citizens.

In Georgia vs. Madrazo, Justice Johnson alludes to this point in the following terms:

"*Now it may seem unaccountable at first view why these exceptions should have been extended to controversies between a State and its own citizens, since controversies between a State and its own citizens is not one of the subjects of jurisdiction enumerated in the Constitution. And the solution is to be found in this:*

that the grant of jurisdiction as to cases arising under the Constitution, laws, &c. of the United States, and of admiralty and maritime causes, is not restricted to or limited by any relation or description of persons. Controversies in these branches of jurisdiction may, therefore, by possibility arise between a State and its own citizens." (1 Peters, 129.)

The defendants seek to exclude States from the purview of the Act of 1875, on the ground that the jurisdiction is given to the Circuit Courts over all suits arising under the Constitution, concurrently with the courts of the States. The theory on which that "concurrent" clause is inserted in congressional legislation is familiar to the profession. It simply excludes a conclusion against the jurisdiction of the State Courts, which might be implied from vesting it in the Federal Courts, in terms of apparent or implied exclusion of the State Courts. As this Act stands, any State may permit herself to be sued upon any cause of action, Federal or otherwise, and her own courts may entertain such suits, though this subject matter jurisdiction is likewise vested through the Constitution, and by the Act of 1875, in the United States Circuit Courts. It is not exclusive in the Supreme Court. (Ames vs. Kansas, 111 U. S.)

We do not deem it important to reply elaborately to the references to Railroad Co. vs. Alabama, 101 U. S., 932. We are not dealing with a license to sue under a State statute; a constitutional right is in question. Nor have we anything to do with the extent to which a right to sue a State may form a contract enforceable under the Constitution. The contract infringed by this State legislation involves the collection of a tax. The right to sue is derived from the remedial clauses of the Federal Constitution. Except for the oral and written

references of our friends, we should not have deemed it necessary to say as much regarding such dissimilar cases.

In our view, the sole debatable question in this case concerns the extent of relief which should have been given by the Circuit Court. It is true, that the clause under which the jurisdiction of the Court was invoked relates to the protection and enforcement of Federal rights. This is the peculiar phase and scope of judicial power involved. The complainant is undoubtedly entitled to a restraint against the defendants from executing the impairment laws in question—from interposing them as an obstacle to the collection of the special tax—from refraining to collect the special tax by reason of such impairment laws. A mandatory injunction couched somewhat in the latter terms, might be deemed the measure of relief under a jurisdiction predicated upon Federal subject matter, were nothing else in the record. But the bill in this case shows that the defendants assumed the broad position: We will not collect this tax, because of the void mandates which we have received from the State. We set them up in opposition to the mandates of the Federal Constitution. By moving to dismiss and demurring, this is the position which the defendants assume. As they concede that the sole ground on which they refuse to execute the contract is of this character, the Circuit Court accepting this disclosure of their conscience, directed them to collect the tax—as the effectual method presented in this case for sweeping away all effect from the impairment law. That is the cause presented by this record. The question arising upon it is not one of reversal, but of modification of the decree. We are

here seeking to protect and enforce a Federal right. We are entitled to the prevention of any effect being given to these impairment laws.

As it appears that the sole obstacle to the collection of the tax arises from the effect which the defendants attribute to these impairment laws, the effectual method of destroying such a position is by directing them to perform the Act. The jurisdiction is well founded, upon a cause arising under the Constitution. The Federal question forms an ingredient (Mayor vs. Cooper, 6 Wall., 247.) A court of equity having jurisdiction, will make that jurisdiction effectual. It is true, that this case differs from the general class of causes to which the above principles relate; inasmuch as while the complainant is entitled to every relief for the protection and enforcement of his Federal right, he is not entitled to overstep the boundary line which separates this Federal action from an ordinary suit against a State, for the collection of a debt.

Upon the record here presented—in the absence of any other than a Federal element—we contend that the Court has simply granted the natural and appropriate decree for the enforcement of a Federal right. When the record shows that the sole obstacle to the collection of the tax is of a Federal character, its enforced collection is the appropriate remedy for eradicating this obstacle. In any event, no further modification of the decree should transpire, than to make it read as follows: "To restrain the defendants from refraining to collect the special tax in question."

It has been suggested, that in order to obtain the relief to which the complainants are entitled on the merits of this cause, it was not necessary to join the

State as a respondent; but, that the necessary relief may be obtained by making the auditor the sole defendant. It will be observed that this point does not touch the main question—whether or not the State be justiciable in this class of causes. It goes merely to the question whether or not the State is a necessary, or only a proper party. That is not a question which is debatable in this Court. It implies that the State is a proper party. However, to meet the question; it appears that the State is a necessary party for the proper obtention of relief. If the decree need not be modified, then the State is clearly a necessary party. If the auditor were the sole party, and the relief were limited to a restraint against refraining from collecting the tax, the remedy would have to be pursued against the several local collecting officers, in the counties of North Carolina, in order to make the decree effectual. By joining the State as respondent, we have the body politic in its executive capacity before the Court, and its several executive agents, subject to process at the foot of the decree. The auditor is joined, for the sake of conformity—as a Constitutional officer, charged by the legislation with specific duties regarding the enforcement of the contract. In any event, the State being a *proper* party, to attain the relief, the *jurisdiction* is not attackable from this point.

In conclusion, some collateral writings which the appellants deem important may be referred to. In the foot-note to page 453, of the second edition of Story's Commentaries, the author refers to the apparent conflict of Hamilton's views, contained in the eighty-first number of the Federalist (in opposition to the construction of the party clauses, afterwards asserted in Chisholm vs. Georgia), and his opinions in the eightieth

number, upon the effect of the subject matter clause. We think that these articles are reconcilable, and that perusal will show that Hamilton distinguished between the measure of jurisdiction for compelling States to obey Constitutional provisions, and the liability to suit for the payment of debts under the party clauses. Perhaps it is not so important to ascertain what any commentator said, when the last words on these very topics have been uttered by this Court in the Chisholm and the Cohens cases. Much has been said by our opponents about the brief of Judge Campbell in New Hampshire vs. Louisiana. Whatever may be the weight attributable to the views contained in that paper, upon the question of party jurisdiction invoked in that case, they bear no relevancy to the case at bar. Indeed, from some expressions contained in it, the author would apparently have recognized the validity of the political reasons by which we have endeavored to maintain the plenitude of the Federal subject matter jurisdiction. Analogies may be drawn from the whole range of jurisprudence and political history to show that States have not been suable to cover debts.

But they are inapplicable to the subject matter principle announced in the Constitution, for the preservation of the integrity of the Federal system. By this jurisdiction, the Courts of the nation are enabled to keep the States within their orbits, and prevent Federal rights from being reduced to mere sounding phrases. Jurisdiction is given because among other reasons the Constitution deemed it to the interest of the United States that contracts should be held inviolate from State legislation. When this contract is made by a State, that condemned legislation, can be thwarted and annulled only in a suit to which she is a party. What

higher political source of jurisdiction can be suggested? This exalted power—so essential to the harmony of our system of government—should not be surrendered.

EDWARD L. ANDREWS,
of Counsel.

BRIEF.

That the Eleventh Amendment was not intended to bear upon the *subject matter* clause as to the extent of the Judicial power of the United States, is suggested upon its face by its enumeration of certain *parties* (of those that had been named in the *party clause* of the Constitution) as persons thereafter to be disabled from suing a State.

It is submitted as evident that if the authors of that Amendment had been members of, and had controlled, the original Convention, they would have signified, and would have attained, the object now effected by that Amendment, by modifying the draft of the Constitution as originally adopted, so that its *party clause* would have read substantially as follows: "The Judicial power shall extend to controversies between a State when plaintiff and citizens of another State, or citizens or subjects of foreign States; and between a State or the citizens thereof and foreign States."

Whether in 1789 a State should in any case sue or be sued in the Courts of the United States upon ordinary controversies arising in matters of business, as under the *party clause*, was a matter for *positive* provision—this not being clearly an *incident* to the policy of the Union then about to be formed; inasmuch as the en-

forcement of ordinary matters of business was not such an incident. But the enforcement of rights created or protected by the Constitution, as by the subject matter clause, was essential to the character, peace, and dignity of the Government thereby established. Whilst a restriction of the number of *positive* provisions as to *parties* was comparatively a matter of mere expediency; the grant of a privilege to certain persons, no matter whom, of immunity from being brought before the judicial power on account of such violations of rights given or guaranteed by the Constitution as by the great theories of political liberty are properly enforceable by that power, seems to be a sort of social suicide, or at least a cutting off one's *thumb*—wholly inadmissible, except so far as in behalf of States, that theory may still prevail (once strongly supported, but now in most respects, except, perhaps, in discussion of this Amendment, gone down the horizon), viz.: that the several States are, each for itself, as much judges of what is Constitutional and what is not as the United States are. That ancient and mortal contention is manifestly at the foundation of any theory that practically a State is not amenable to the judicial power of the United States for any violations by it of a right given or protected by the Constitution; such *right* being thus defeated of *enjoyment* by a lawful nullification.

Just as in old times, it was an accepted maxim of State that *there is but a step betwixt the imprisonment and the death of a King*; so it may well be said that betwixt the continual fettering of Right in practice, and its total disappearance, there is *but a step*. For those who in practice are habitually allowed to disregard Right, it does not exist. So far, these persons are

coequal with the authorities, by whom such Right has been declared.

Mr. Webster's reply to Mr. Hayne has convinced the reason of the Continent that this doctrine has no foundation. At present it only *latitat et discurrit* through the United States—lurks in corners; being supposed, for instance, to animate the Eleventh Amendment.

It is true that that Amendment, at the point where for a second time it uses the term "United States," does so in a sense in which it no where else appears in the Constitution, viz.: as meaning *States united;* but this departure from the *usus loquendi* of the Convention (according to which the phrase, "One of the United States," would have meant *One of it*), is not to be pressed to show that in other respects that Amendment is animated by an intention to dislocate great harmonies of the Constitution, and to import a provision as to *parties* which the occasion that called it forth and its wording refer to a clause in which, as has been well said by the highest authorities, *parties are everything, and subject matter nothing*—into another clause in which *parties*, no matter whether United States, States, Principalities, or Potentates, are NOTHING —and *subject matter* EVERYTHING!

It is submitted as certain that those friends of the Constitution, who in the early history of this country were opposed to allowing States to be sued in the Courts of the United States, referred entirely to such liability under the *party clause;* that Hamilton, and Madison, and Marshall and others, who before the adoption of the Constitution denied that such liability would arise thereunder, were alluding entirely to the *party clause.* It is also certain that the suits which occasioned the Eleventh Amendment were suits under the *party clause;*

and that the frame of that Amendment naturally refers its readers to that clause. Equally certain is it that during the whole time of the survival of the framers of the Constitution and the generation which succeeded them, the denials of jurisdiction so generally quoted refer to the *party clause*.

It must be true as to all business documents intended to regulate the lives of men, no matter what the order of the dignity of such documents, that they display what is known in Courts as "general intention" and "particular intention;" that in order to arrive at the meaning of passages supposed to display such particular intention, whether these be contained in codicils, or amendments, or the like, the occasions which produced them are to be scrutinized; and that in case of collision between the two sorts of intention, the latter is to give way. These maxims in the administration of law are applicable, and have often been applied, to the Constitution.

The general intention of the Constitution in respect to remedies in matters of Right created or guarantied by it, is displayed in the Preamble, which enumerates the Establishment of Justice as one of its greatest designs. Whilst the King of England, by words which have successfully been quoted by his subjects against him in every generation since the year 1215, by negative words promised that *he would not deny justice to anyone*, the American People, taking courage and assurance from events which had transpired in the five hundred years since Magna Charta engaged their word and power affirmatively to establish Justice—this of course for the purpose of those rights which they then either created or guarantied.

As part of the Justice established by it in its

subject matter clause, there can be no doubt that under the Constitution, as originally framed and ten times amended, a citizen of a State could sue it for violations, otherwise justiciable of his Federal rights of property. In the investigation of such a question, it would at that time, of course, have been impertinent to scrutinize the phrases farther on in the same instrument, connected with "citizens of another State;" "citizens or subjects of foreign States." For these phrases had been introduced into the Constitution to give the judicial power a verge, the existence of which in relation to the particular government then created would in their absence have been extremely doubtful. It was in exercise of this power (given as it were by a sort of *annex* to the main purposes of the Constitution), over States then greatly in debt, which occasioned the Eleventh Amendment. That is the *subjecta materia* to which by the philosophy of the law any *verba generalia* therein would have to be *restrained* in order practically from time to time to establish justice amongst persons, natural and artificial, involved in disputed questions of Right.

Such is the full extent to which unquestionable theories of jurisprudence conduct alike students and Courts.

But in the present case, as is to be added, there are in the exceptional provisions, that is in the exhibition of a *particular* Constitutional *intention*, no general words (or other) which affect the power of the citizen to sue his own State under the *subject matter* clause. This particular case under the judicial power to enforce the Constitution in regard to *subject matter*, is plainly omitted. The maxim as to *verba generalia* and *subjecta materia* need be called in only when some other person than a citizen of its own seeks against a State

in Court protection under the *subject matter* clause. That if originally a citizen could have sued his own State for any violation of his Federal rights, he can do as well since the adoption of the Eleventh Amendment seems plain. *And this is an ear-mark the effect of which in showing that that Amendment concerns the subject matter clause in no respect, and as to no party, cannot be successfully met!*

S. F. PHILLIPS,
for Temple.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1034.

ALFRED H. TEMPLE, RESPONDENT,

vs.

THE STATE OF NORTH CAROLINA ET AL., APPELLANTS.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Alfred H. Temple respectfully shows that he is the respondent in the appeal above entitled, and that the point presented by the record therein and decided in favor of the complainant below is: Have the Federal courts jurisdiction of a suit against a State by one of its citizens to protect his Federal rights?

Your petitioner is informed that the aforesaid question has recently been presented by brief and oral argument to this Court in what are known as the Virginia cases, and may be now under advisement.

Your petitioner takes the earliest opportunity after knowledge of the above matter to bring to the attention of this Honorable Court the consideration that the same important

question of law is presented in this appeal numbered 1034 on the docket of this Court. In this cause that question is the main issue in the suit, whereas in the Virginia cases above referred to it is at best, perhaps, only collateral.

Your petitioner is, of course, not well advised as to what points the said Virginia cases may really involve, and submits this application only in order to inform the Court of his situation towards a question of so great gravity and now of the first impression.

Your petitioner respectfully asks that he may have an opportunity to be heard by counsel on the aforesaid question while the same may be under advisement.

Your petitioner likewise shows that the case of Hans *vs.* Louisiana, No. 257 on the present docket of this Court, involves the same question of Federal jurisdiction that is above set forth.

Wherefore your petitioner prays that this appeal be set down for hearing at some early day before a decision upon the question above described, or that this Honorable Court may give such direction in reference to the hearing of this appeal as to it may seem just.

S. F. PHILLIPS,
For the Appellant.

Upon the above application it is ordered that notice be served upon the counsel of record for the defendant to show cause on Monday, December , 1887, why the appeal above entitled shall not be advanced as prayed.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1034.

THE STATE OF NORTH CAROLINA, APPELLANT,

vs.

ALFRED H. TEMPLE.

MOTION TO ADVANCE.

The case above mentioned, which, in another connection, has already been before THE COURT at this term, involves a question presented also in *Hans* vs. *Louisiana, No.* 257, to wit: *Whether for its violation of a Federal right of one of its own citizens a State can be sued by the latter in a court of the United States.*

Upon behalf of the appellee it is, therefore, submitted that it is proper that Temple's case (above) should be advanced and heard immediately after that of *Hans.*

S. F. PHILLIPS,
For Temple.

DECEMBER 19, 1887.